Supreme Court, U.S.
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No. ——— 10-389

In the

Supreme Court of the United States

JOSE GUEVARA,

Petitioner,

v.

REPUBLICA DEL PERU, AND
MINISTERIO DEL INTERIOR DEL PERU,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The commercial activity exception to the Foreign Sovereign Immunities Act ("FSIA") identifies three grounds for which a sovereign's commercial activity will subject it to jurisdiction in U.S. courts. The third ground permits a party to overcome the statute's presumption of immunity based upon a sovereign's act performed in connection with commercial activity elsewhere which causes a "direct effect" in the United States. In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), this Court determined that an effect is "direct" if it follows "as an immediate consequence of the defendant's . . . activity." *Id.* at 618 (quoting *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d Cir. 1991)) (ellipses in original). In so holding, this Court expressly rejected the notion that the commercial activity exception "contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Id.*

Nevertheless, the circuits remain evenly split on what constitutes a "direct effect." While some circuits persist in requiring evidence that a "legally significant act" occurred in the United States, others reject that requirement as precluded by this Court's decision in *Weltover*. This conflict is deep, ongoing, and ripe for resolution. The question presented is especially important because the unique facts of this case highlight the important role that the FSIA and its commercial activity exception will play in transactions which impact our national security. Accordingly, the question presented is:

Whether the commercial activity exception's "direct effect" clause requires evidence that a "legally

significant act" occurred within the United States in order to vest American courts with jurisdiction over a foreign sovereign.

RULE 14.1(b) STATEMENT – PARTIES

The following were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit:

1. Jose Guevara – Plaintiff/Counter-Defendant/Appellee/Cross-Appellee, Petitioner on Review.

2. Republica del Peru – Defendant/Counter-Claimant/Cross-Appellant, Respondent on Review.

3. Ministerio del Interior del Peru – Defendant/Counter-Claimant/Cross-Appellant, Respondent on Review.

4. Antonio Ketin Vidal – Defendant/Counter-Claimant/Cross-Appellant.

5. Fernando Rospigliosi – Defendant/Counter-Claimant/Cross-Appellant.

6. Luis Alfredo Percovich – Proposed Intervenor/Appellant.

7. United States of America – *Amicus Curiae* in support of Defendant/Counter-Claimant/Cross-Appellant, Republica del Peru.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit has twice considered whether Respondents were immune from suit under the FSIA. The Eleventh Circuit's first decision, finding that the district court erred in dismissing the complaint because Respondents' offer of a monetary reward in exchange for information leading to the capture of an international fugitive fell within the FSIA's "commercial activity" exception, is reported at 468 F.3d 1289 (*Guevara I*). The district court's subsequent order granting summary judgment in favor of Petitioner is published at 2008 WL 4194839. The Eleventh Circuit's decision reversing summary judgment, on the ground that Respondents' offer of a monetary reward in exchange for information did *not* fall within the commercial activity exception, is reported at 608 F.3d 1297 (*Guevara II*).

JURISDICTION

The court of appeals entered its judgment on June 18, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The commercial activity exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), provides that:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

STATEMENT OF THE CASE

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602, *et seq.*, provides the "'sole basis' for obtaining jurisdiction over a foreign state in the United States." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)). This case arises from the application of the commercial activity exception – the "most significant of the FSIA's exceptions." *Id.* The question presented recurs frequently and is often dispositive of a plaintiff's claims against a foreign sovereign. Moreover, this case presents an important gloss on the interplay between the commercial activity exception, the FSIA, and our national security in the context of a post-9/11 world, where reward offers are regularly made in exchange for sensitive information on the location of dangerous fugitives. Indeed, the extent to which the U.S. courts should play a role in enforcing reward offers made by

foreign states has exposed a rift between the Federal Bureau of Investigation and the U.S. Department of State. While the FBI supported Petitioner's claim below, the State Department urged the Eleventh Circuit to reverse for fear that relations between the two countries would be strained if the judgment was affirmed. All of these factors compel this Court's intervention.

1. "This case's facts read like the latest spy thriller." App. at 3a. Throughout the 1990s, Vladimiro Lenin Montesinos Torres advised former Peruvian President, Alberto Fujimori, and led Peru's National Intelligence System. *Id.* Montesinos abused the power of his office, committing various criminal acts, from arms trafficking, drug dealing, and money laundering, to extortion and murder. *Id.* His conduct earned him comparisons to Rasputin, Darth Vader, Torquemada, and Cardinal Richelieu. *Id.* at 48a. On the evening of September 14, 2000, a video aired on Peruvian national television showing Montesinos bribing a congressman-elect. *Id.* at 49a. Two days later, President Fujimori dissolved the national intelligence agency and announced that he would resign from office following new elections. *Id.* As the government collapsed, Montesinos boarded a yacht bound for the Galapagos Islands. *Id.* at 50a. In November, 2000, a special prosecutor in Peru issued warrants for Montesinos' arrest. *Id.* Peru's fugitive spy chief, however, had vanished. *Id.* To generate new leads, Interim President Valentin Paniagua Corazao issued Emergency Decree 049-2001, which established a five million dollar reward for accurate information directly leading to Montesinos' location and capture. *Id.* at 50a-51a.

Montesinos eventually resurfaced in Caracas, Venezuela, where he underwent facial reconstruction surgery to change his identity. *Id.* at 9a. In December, 2000, Petitioner Jose Guevara, a former Venezuelan intelligence officer, was introduced to a bandaged man in need of a safe house and security. *Id.* For the next seven months, Petitioner served Montesinos as both protector and emissary. *Id.* at 9a-10a. In late June, 2001, Petitioner traveled to Miami, Florida, to meet with a banker on Montesinos' behalf. *Id.* at 10a. Alerted to Petitioner's ties to Montesinos, the FBI tracked Petitioner to a hotel in downtown Miami and arrested him. *Id.* Once in custody, the FBI – at Respondents' direction – conveyed Respondents' $5 million reward offer for information leading to Montesinos' capture. *Id.* at 11a. Petitioner accepted.

The FBI alerted Peruvian and Venezuelan authorities who were working jointly to develop a plan to capture Montesinos based on Petitioner's information. *Id.* at 11a-12a. From Miami, Petitioner contacted Montesinos, as well as his associates, on multiple occasions. *Id.* These controlled calls were carefully orchestrated to facilitate Montesinos' capture. Petitioner initially contacted Montesinos to update the fugitive spy chief on his meeting with the Miami banker. *Id.* at 11a. On the following day, June 23, 2001, Petitioner made additional telephone calls from Miami to his associates in Venezuela to coordinate Montesinos' handover. *Id.* at 12a. Antonio Ketin Vidal Herrera, then Peru's Minister of the Interior, reiterated to the FBI that Petitioner would be paid the $5 million reward if he disclosed Montesinos' location in Caracas. *Id.* at 12a-13a. Within hours, Petitioner successfully coordinated Montesinos' handover. *Id.* at 13a. The next day, the FBI informed

Petitioner that Montesinos had been captured. *Id.* On June 25, 2001, the FBI released Petitioner from custody, and all charges against him were dismissed. *Id.*

2. From the time of Petitioner's arrest until the district court granted summary judgment, the FBI directly urged Respondents to pay Petitioner the promised reward. On October 29, 2001, Special Agent Kevin Currier wrote to the new Minister of the Interior, Fernando Rospigliosi, requesting that Respondents pay the reward they offered Petitioner. *Id.* at 80a-81a. In his communications with Respondents, Agent Currier confirmed that Petitioner satisfied the conditions of the reward: "Mr. Guevara provided the key information that led to the location and capture of fugitive Vladimiro Montesinos." *Id.* at 81a. On October 30, 2002, Agent Currier again wrote to Peru's Minister of the Interior, by then, Gino Costa, requesting that Respondents honor their promise to pay Petitioner the reward. *Id.* at 82a-83a. In his letter, Agent Currier noted that his request that Petitioner be paid constituted "the FBI's official response relating to the reward." *Id.* at 82a. Agent Currier concluded by reaffirming Petitioner's "key contributions which led to the location and capture of Montesinos." *Id.* at 83a.

3. Despite Petitioner's principal role in Montesinos' location and capture, Respondents refused to pay the reward. Unable to reach a resolution, Petitioner sued Respondents in a Florida State court.[1] *Id.* at 52a.

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[1] The original lawsuit also named, as individual defendants, Peru's former Ministers of the Interior, Antonio Ketin Vidal and Fernando Rospigliosi. The district court granted summary

Respondents removed the action to federal court pursuant to the FSIA, and the district court dismissed the action on sovereign immunity grounds. *Id.* at 52a-53a. On appeal, the Eleventh Circuit reversed, concluding that a foreign state's offer of a reward in return for information enabling it to locate and capture a fugitive falls within the FSIA's commercial activity exception: "When it issued the offer contained in the Emergency Decree, Peru entered the marketplace of information. It did so not as a regulator but as a purchaser in the manner available to any private individual, and that makes its actions commercial." *Id.* at 72a. In addition to being legally correct, the Eleventh Circuit concluded that its decision was also consistent with sound public policy:

> Accepting Peru's position, dressed though it is in the clothing of sovereignty, would frustrate rather than further the ability of countries to carry out their sovereign functions. Anything that makes it easier for countries to welch on their promises to pay for information decreases the real value of any reward they offer and makes it less likely that an offer will be accepted. As Guevara has learned up to this point in the litigation, the promise of a multimillion dollar reward means little or nothing to an informant if the country offering the reward cannot be made to pay it. The holding Peru asks us to reach would jeopardize not only its vital interests but those of every

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judgment in their favor, and they are not part of this case. *See* App. at 8a n.9.

> country that offers rewards for information, including this country.

Id. at 72a-73a.

4. On remand, the district court entered summary judgment in Petitioner's favor. In its ruling, the district court noted that "[t]he parties agree that Peru's offer of a reward in exchange for information was an offer to enter into a unilateral contract. . . . The only consideration necessary in a unilateral contract," the district court explained, "is the offeree's performance." *Id.* at 39a. Thus, concluded the court, "[o]nce the offeree performs, the offeree has accepted the offer, thereby creating a contract that binds the offeror." *Id.* Noting that "Peru's Emergency Decree No. 049-2001 offered a reward of $5,000,000.00 for information enabling the location and capture of Montesinos," the district court reasoned that "[a]ll that remained for completion of the contract was for someone to perform the terms of the offer by providing such information." *Id.* The district court ultimately concluded that Petitioner "provided the information and assistance that led to Montesinos's capture and arrest by Venezuelan authorities the evening of June 23, 2001." *Id.* at 41a. Respondents appealed.

5. A divided Eleventh Circuit reversed. Writing for the majority, Judge Tjoflat began with the proposition that the prior panel decision had not fully disposed of the immunity question. *Id.* at 15a. The majority explained that its prior decision only addressed "whether Peru's offer of a reward was a commercial activity . . . ." *Id.* at 17a. According to the majority, this partial resolution left open, "albeit implicitly," the question of subject matter jurisdiction. *Id.* Judge

Tjoflat explained that the district court failed to analyze whether Respondents' activity fell under any of the independent bases for jurisdiction under the commercial activity exception. *Id.* at 19a. Having found the district court's analysis incomplete, the appellate court took up the question.

The majority initially determined that Respondents' commercial offer did not satisfy the first two prongs of the commercial activity exception. *Id.* at 20a-23a. With respect to the third basis for jurisdiction – the subject of the circuit split at issue here – Judge Tjoflat framed the question presented as "was the effect sufficiently direct and sufficiently in the United States that Congress would have wanted an American court to hear the case?" (internal quotation marks omitted). *Id.* at 23a-24a. The majority rejected Petitioner's claim that by accepting the reward offer in Miami, Respondents' commercial activity caused a direct effect in the United States. In the majority's view, Petitioner's "acceptance-related activity" consisted of a "one-off telephone communication" between Peru's then Minister of the Interior and the FBI. *Id.* at 25a. Noting that in the context of personal jurisdiction, a single call would not be sufficient to establish minimum contacts, Judge Tjoflat determined that the call did not result in a direct effect in the United States. *Id.* The majority likewise rejected Petitioner's claim that the failure to make payment within the United States constituted a direct effect. *Id.* Finally, Judge Tjoflat discounted the FBI's arrest of Petitioner as constituting a direct effect. The arrest resulted, concluded the court, not from Respondents' commercial activity, but from Petitioner's criminal acts in the United States. *Id.* at 25a-26a.

Judge Cox dissented, finding that the question of whether Respondents were entitled to immunity was no longer at issue. According to Judge Cox, the majority's view to the contrary rested on a "faulty premise." *Id.* at 27a. "In deciding that the [commercial activity] exception applies to Peru's actions," Judge Cox explained that the prior panel's decision "necessarily decided that a nexus existed between that commercial activity and the United States." *Id.* at 28a. He added that the *Guevara I* panel "implicitly held that the commercial activity was carried on in the United States, that an act was performed in the United States in connection with commercial activity elsewhere, or that a direct effect of the commercial act was caused in the United States." *Id.*

6. The commercial activity exception lists three grounds under which immunity may be overcome. 28 U.S.C. § 1605(a)(2). Under the third ground, a sovereign will not be entitled to immunity where a lawsuit is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." *Id.* In *Weltover,* this Court granted review to consider the meaning of the phrase "direct effect," as used in the commercial activity exception. Finding that "an effect is direct if it follows as an immediate consequence of the defendant's . . . activity," the Court expressly rejected the notion that the commercial activity exception "contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Weltover,* 504 U.S. at 618 (internal quotation omitted, ellipsis in original).

In light of its decision in *Weltover*, this Court vacated and remanded for further consideration the

Second Circuit's decision in *Antares Aircraft, L.P. v. Fed. Republic of Nigeria,* 505 U.S. 1215 (1992). On remand, Judge Winter, writing for a divided panel, reanimated the "substantiality" requirement that this Court rejected in *Weltover.* Although this Court "did not expressly adopt [the Second Circuit's] 'legally significant acts' test," Judge Winter explained, it "used a similar analysis." *Antares Aircraft, L.P. v. Fed. Republic of Nigeria,* 999 F.2d 33, 36 (2d Cir. 1993). On this basis, the Second Circuit has continued to apply the "legally significant act" requirement. From *Antares* surged the conflict that continues to divide the circuits.

REASONS FOR GRANTING THE WRIT

The Foreign Sovereign Immunities Act is the sole basis for obtaining jurisdiction over a foreign state in a court in the United States. This case implicates the commercial activity exception – the most significant of the FSIA's exceptions. Because sovereign states are presumptively immune, the determination of whether the commercial activity exception applies will be case dispositive. Although this Court previously considered the meaning of the commercial activity exception, its decision did not bring uniformity to the circuits. To the contrary, this Court's decision resulted in a deep and pervasive conflict among the federal courts. That division, as the Eleventh Circuit's decision here demonstrates, continues to deepen. Even within the camp that has strayed from this Court's original ruling, divisions are forming. A conflict among the circuits regarding the sole vehicle for obtaining jurisdiction over a foreign sovereign is untenable.

This case presents an ideal opportunity for resolving this conflict. First, the question presented

was raised below and directly addressed by the Eleventh Circuit, twice. Second, the question presented is likely to recur frequently.[2] Finally, this case raises an important question of public policy. As the Eleventh Circuit here acknowledged, Respondents' refusal to pay the reward monies "jeopardize[s] not only its vital interests but those of every country that offers rewards for information, including this country." App. at 72a-73a. The need to resolve the conflict here is even more important in light of the division between the FBI and the Department of State that this case has exposed. While the FBI directly urged Respondents to pay the reward, the State Department took the opposite approach. The policy divide between these two important entities, brought to light by the unique facts here, confirms this case's significance.

I. This Court Should Grant Review To Definitively Settle The Split Among The Circuits Regarding The Meaning Of The FSIA'S Commercial Activity Exception.

In *Weltover*, this Court rejected the notion that the commercial activity exception "contains any unexpressed requirement of substantiality or foreseeability." 504 U.S. at 618 (internal quotation marks omitted). As a consequence, this Court ruled that "an effect is direct if it follows as an immediate consequence of the defendant's . . . activity." *Id.*

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[2] *See, e.g., Leviathan Inc.*, ECONOMIST, Aug. 7, 2010, at 9-10 (reporting that sovereign governments are increasingly becoming involved in private business enterprises in an effort to jump-start local economies, highlighting that "[n]ine of the world's 30 largest listed firms are emerging-market companies that count the state as their dominant shareholder.").

(internal quotation omitted, ellipsis in original). This Court's decision in *Weltover,* however, did not settle the question. *See* Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts Like a Private Party, Treat it Like One*, 5 CHI. J. INT'L L. 675, 687 (2005) ("The *Weltover* decision ignited confusion and controversy over whether the direct effect clause mandates a finding of a legally significant act in the United States.").

Shortly after this Court ruled, the Tenth Circuit acknowledged its continuing "struggle[] to identify objective standards that would aid in determining what does and does not qualify as a 'direct effect in the United States.'" *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n,* 33 F.3d 1232, 1237 (10th Cir. 1994). The court explained that "[t]he phrase itself seems hopelessly ambiguous when applied to any particular transaction." *Id.* Lamenting what it saw as the lack of any guidance, the Tenth Circuit concluded that "[t]he guideposts previously adopted by many courts – the requirement that a direct effect be both 'substantial' and 'foreseeable' – was expressly rejected by the Supreme Court in *Weltover." Id.*

The twin guideposts of "substantiality" and "foreseeability," however, have failed to bring uniformity to the circuits' view of what constitutes a "direct effect." The Second, Ninth, and Eleventh Circuits have returned to the "legally significant act" requirement that this Court expressly rejected in *Weltover.* Yet, the re-introduction of this test has only caused more division. The "legally significant act" requirement is susceptible to various interpretations. The courts part ways, for example, in their analyses of

the act's location. Some contend that a "legally significant act" must occur within the United States, while others will deem the act "significant" if it occurs abroad. The Eleventh Circuit, in this case, has added another dimension to the conflict, analogizing the "legally significant act" requirement to the minimum contacts test applied in determining whether personal jurisdiction exists. App. at 24a-25a. In sharp contrast, the Fifth, Sixth, and Tenth Circuits have rejected the "legally significant act" requirement, noting that its imposition not only conflicts with this Court's ruling in *Weltover,* but with the commercial activity exception's plain meaning. Therefore, the conflict among the circuits is deep, pervasive, and, given the Eleventh Circuit's ruling here, likely to expand, especially within those circuits applying the "legally significant act" requirement.

1. Following *Weltover,* this Court vacated and remanded for further consideration the Second Circuit's decision in *Antares Aircraft, L.P. v. Fed. Republic of Nigeria,* 505 U.S. 1215 (1992). On remand, the Second Circuit noted that although this Court "did not expressly adopt [the Second Circuit's] 'legally significant acts' test, it used a similar analysis." *Antares Aircraft, L.P.*, 999 F.2d at 35. Because this Court's analysis of the "direct effect" clause did not foreclose the result reached by the Second Circuit through its application of the "legally significant acts" requirement, the Second Circuit determined that the test remained "viable." *Hanil Bank v. PT. Bank Negara Indonesia, (PERSERO),* 148 F.3d 127, 133 (2d Cir. 1998); *see also Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 931 (2d Cir. 1998) (recognizing the "legally significant acts" test and explaining that it "requires that the conduct having a direct effect in the

United States be legally significant conduct in order for the commercial activity exception to apply").[3] Applying the same reasoning, the Ninth and Eleventh Circuits have likewise adopted the "legally significant acts" requirement. *See Adler v. Fed. Republic of Argentina,* 107 F.3d 720, 726-27 (9th Cir. 1997) (recognizing application of the Second Circuit's "legally significant acts" test); *see also Harris Corp. v. Nat'l Iranian Radio and Television,* 691 F.2d 1344, 1351 (11th Cir. 1982).

What constitutes a legally significant act, however, remains unsettled. The test, as the Tenth Circuit has observed, "is defined in different ways." *Orient Mineral Co. v. Bank of China,* 506 F.3d 980, 998 (10th Cir. 2007). Some courts have ruled that the location of the legally significant act is dispositive. The Second Circuit and the Eleventh Circuit here have held that a legally significant act would satisfy the "direct effects" test if it occurred inside the United States. *See* App. at 23a-24a ("As we have framed it, the question presented is, was the effect sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case?") (internal quotation omitted); *Virtual Countries, Inc. v. Republic of S. Africa,* 300 F.3d 230, 240-41 (2d Cir. 2002) (holding that for the "direct effect" clause to apply, a sovereign must commit a legally significant act in the United States). The Ninth Circuit, in turn, has determined that an act taking place outside the

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[3] Although the Second Circuit made no mention of the "legally significant act" requirement in deciding *Commercial Bank of Kuwait v. Rafidain Bank,* 15 F.3d 238 (2d Cir. 1994), it specifically referenced and applied the requirement in its subsequent decisions.

United States can result in a "direct effect" in the United States. *See Adler v. Fed. Republic of Nigeria,* 219 F.3d 869, 876 (9th Cir. 2000) (finding that reliance by U.S.-based plaintiff on fraudulent statements made outside the United States is sufficient to satisfy the "direct effect" clause).

The location of the act itself, however, may not be dispositive. In this case, the Eleventh Circuit has equated the legally significant act requirement with the minimum contacts test applied in the personal jurisdiction context. App. at 25a (concluding that the same reasoning used in a minimum contacts analysis applied equally to jurisdictional questions under the "direct effect" clause). Thus, while a single act, committed in the United States, may be sufficient in some circuits that impose the "legally significant acts" requirement, it may fall short in the Eleventh Circuit. Even before the Eleventh Circuit here added further to the division on the meaning of the "legally significant acts" requirement, the Tenth Circuit questioned its application: "the phrase . . . is vague and ambiguous, adding nothing to the analysis." *Orient Mineral Co.,* 506 F.3d at 999.

2. In sharp contrast, the Fifth, Sixth, and Tenth Circuits have rejected the "legally significant act" requirement as inconsistent with this Court's decision in *Weltover. See Orient Mineral Co. v. Bank of China,* 506 F.3d 980, 998 (10th Cir. 2007); *Am. Telecom Co., L.L.C.. v. Republic of Lebanon,* 501 F.3d 534, 540 (6th Cir. 2007); *Voest-Alpine Trading USA Corp. v. Bank of China,* 142 F.3d 887, 895 (5th Cir. 1998). These circuits view the proper interpretation of the "direct effect" clause as grounded in the plain meaning of the commercial activity exception. In these circuits, the

imposition of the "legally significant act" requirement fails because it conflicts with the plain language of the statute, and renders portions of the commercial activity exception superfluous. The Fifth Circuit's decision in *Voest-Alpine* analyzed the problems inherent in the "legally significant act" requirement at length.

Writing for a unanimous panel of the Fifth Circuit, Judge Jolly explained that "nothing in the text of the third clause supports" the "legally significant act" requirement. *Voest-Alpine,* 142 F.3d at 894. The commercial activity exception's third clause, explained the court, "simply requires (1) an act outside the United States (2) in connection with commercial activity outside the United States (3) that causes a direct effect in the United States." *Id.* (citing 28 U.S.C. § 1605(a)(2)). Because this Court in *Weltover* "expressly admonished the circuit courts not to add 'any unexpressed requirement[s]' to the third clause and specifically rejected the argument that direct effects must be substantial or foreseeable," the court determined that the "legally significant act requirement" has been "renounced." *Id.* (alteration in original).

Directly addressing the sole argument raised by the competing circuits, the Fifth Circuit noted that "*Weltover's* reliance on a legally significant act in the United States does not justify, much less compel, the conclusion that it is or should be some kind of threshold requirement under the third clause." *Id.* To the contrary, the court explained, "[a] legally significant act in the United States will certainly cause a direct effect in the United States, but that does not mean that a direct effect in the United States can be

caused *only* by a legally significant act in the United States." *Id.* (emphasis in original).

Second, Judge Jolly explained that the imposition of a "legally significant act" requirement would render certain portions of the commercial activity exception superfluous. "[R]equiring the effect to have a causal nexus with some legally significant act in the United States merges the third clause into the second clause of the commercial activity exception." *Id.* at 895. The court noted that "[t]he second clause requires that the cause of action be based upon (1) an act in the United States (2) in connection with commercial activity outside the United States." *Id.* (citing 28 U.S.C. § 1605(a)(2)). Analyzing the second clause, the court reasoned that "the act *in the United States* must give rise to the cause of action or, in other words, be a 'legally significant act' as the term is used by courts adopting such a requirement." *Id.* (emphasis in original). By reading the statute this way, Judge Jolly explained, the second clause becomes "indistinguishable" from the third clause. *Id.* If anything, "the third clause would also require proof of an act outside the United States upon which the action is also based and which caused a direct effect in the United States." *Id.* Judge Jolly reasoned that this interpretation "leaves [the third clause] with no perceivable purpose, as plaintiffs would always opt to seek jurisdiction under the 'lesser included' second clause." *Id.*

3. This case presents an ideal vehicle for resolving the conflict among the circuits. The core facts are undisputed. Respondents offered a monetary reward in exchange for information leading to the capture of a fugitive. The offer itself constituted commercial

activity. App. at 17a. Moreover, under Florida law, Respondents' offer became a binding contract when Petitioner accepted the offer by performing, i.e., he provided information and coordinated efforts from the United States which led to the location and capture of the fugitive Montesinos. *Id.* at 39a. The sole question before the Eleventh Circuit was whether Respondents' offer, and their activities in connection with that offer, were sufficient to waive immunity. *Id.* at 19a. The issue was squarely addressed by the appellate court, and is dispositive of this case.

II. By Allowing Respondents To Welch On Their Promise To Pay The Reward, The Decision Below Undermines Both Domestic and International Efforts To Capture Criminals And Terror Suspects.

This case is about more than the proper reading of the commercial activity exception. Because of the unique facts here – the exchange of money for information regarding the location of an international fugitive – the Eleventh Circuit's decision reversing summary judgment will have far-reaching consequences. Writing for a unanimous panel in *Guevara I*, Judge Carnes made clear that "[e]nforceable commitments are important to reward programs, which are in turn important to the sovereign interests of this and other countries." App. at 74a-75a. The Eleventh Circuit's decision reversing summary judgment undermines not only the value of reward programs, but the interests of those sovereigns offering payment for vital information.

In the United States, there are a number of statutes that authorize the executive branch to offer

financial rewards in exchange for information useful in combating terrorism, espionage, narcotics trafficking, violations of human rights laws, and other criminal acts. *Id.* at 73a (collecting statutes). These programs benefit not only the United States, but our allies abroad. Indeed, even Respondents, who have thus far refused to honor their own reward offers, are directly benefiting from similar U.S. reward programs.

Notably, the United States is currently offering rewards for the arrest and/or conviction of two Peruvian fugitives – Florindo Eleuterio Flores-Hala[4] and Victor Quispe Palomino.[5] The U.S. Department of State describes both men as members of the Sendero Luminoso (the "Shining Path"),[6] "a notoriously violent terrorist group that controlled large areas of Peru and struck the capital Lima with repeated violent attacks."[7] The award amount – up to $5 million per person[8] – is the very same amount Respondents offered Petitioner for the location and capture of Montesinos. These reward programs are effective

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[4] UNITED STATES DEP'T OF STATE, Narcotics Rewards Program: Florindo Eleuterio Flores-Hala, http://www.state.gov/p/inl/narc/rewards/144800.htm (last visited Sept. 14, 2010).

[5] UNITED STATES DEP'T OF STATE, Narcotics Rewards Program: Victor Quispe Palomino, http://www.state.gov/p/inl/narc/rewards/144801.htm (last visited Sept. 14, 2010).

[6] UNITED STATES DEP'T OF STATE, Bureau of Consular Affairs, Peru: Country Specific Information, http://travel.state.gov/travel/cis_pa_tw/cis/cis_998.html (last visited Sept. 14, 2010).

[7] *See supra*, notes 4-5.

[8] *Id.*

precisely because the United States has a track record of payment.

Since September 11, 2001, the United States has paid at least $47 million in reward monies. App. at 73a. The success of these programs turns on this country's willingness to honor its promises to pay:

> Had the KGB agent who accepted the reward offer in the [Bob] Hanssen case had reason to doubt whether the United States would pay as promised, he would not have risked his life to provide the information that he did, information that was vital to this country's national security interests. The same is true of those who provided the information that enabled the United States to corner Uday and Quasay Hussein and to capture Ramzy Yousef.

Id. at 74a. Although none of the statutes authorizing the United States government to pay reward monies "contains a waiver of sovereign immunity," Judge Carnes aptly noted that "reward offers are only as effective as they are enforceable." *Id.* With good reason then, Judge Carnes concluded that "[a]bsent a clear requirement in the FSIA, we will not create impediments to the enforcement of reward contracts entered by this or any other country." *Id.* at 75a. And yet, there can be no greater impediment to the effectiveness of such reward programs than the Eleventh Circuit's decision in *Guevara II*.

In reversing the district court's summary judgment, the Eleventh Circuit treated this case like any other piece of commercial litigation. In so doing, the panel that decided *Guevara II* ignored the significant public

policy considerations Judge Carnes had identified in his prior decision reversing the dismissal of Petitioner's complaint. This is not a typical fact pattern; this case does not involve the type of commercial activity regularly considered by the courts in determining whether an exception to the FSIA's presumed immunity applies. *See, e.g., Weltover*, 504 U.S. at 609-10 (default on bond obligations by failure to make payment); *Am. Telecom*, 501 F.3d at 536-37 (breach of contract and associated tort claims premised on a bidding contract to manage cellular telephone networks); *Hanil Bank*, 148 F.3d at 129-30 (failure to remit payment due under a letter of credit).[9] As such, this case requires closer scrutiny. In the current security environment, U.S. courts ought not to be seen as hostile to claims such as those raised by Petitioner.

Indeed, what is particularly astonishing about the result here is the division it has exposed between the FBI, the nation's premier law enforcement agency, and the Department of State. Throughout the life of this litigation, the FBI has steadfastly supported Petitioner's claim to the reward. Directly appealing to the highest levels of Peru's government, the FBI confirmed Petitioner's decisive role in the location and capture of Montesinos and urged that Respondents pay the reward. App. at 80a-83a. The FBI's concern, of course, is obvious.

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[9] The atypical nature of the facts here, however, does not render this an improper vehicle for resolving the question presented. To the contrary, the facts here highlight the need to resolve the conflict among the circuits. The question presented not only includes the standard commercial activity considered by the courts, but the unique facts of this case which reflect the current security environment.

As a law enforcement agency, the FBI is well-acquainted with the vital role that informants play in the capture and prosecution of fugitives and, in the wake of 9/11, the fight against terrorism. *See United States v. Ihnatenko*, 482 F.3d 1097, 1100 (9th Cir. 2007) (noting that "[p]aid informants play a vital role in the government's infiltration and prosecution of major organized crime and drug syndicates," and that "[w]ithout informants, law enforcement authorities would be unable to penetrate and destroy organized crime syndicates, drug trafficking cartels, bank frauds, telephone solicitation scams, public corruption, terrorist gangs, money launderers, espionage rings, and the likes"); *see also* Kent Roach, *Review and Oversight of National Security Activities and Some Reflections on Canada's Arar Inquiry*, 29 CARDOZO L. REV. 53, 77, 83 (2007) (arguing that "[p]articular care should be taken with respect to the proper treatment of informants and witnesses who play a vital role in successful terrorism prosecutions" and that judicial review of complaints from informants is critical to ensure that the legal rights of informants are protected).

In sharp contrast, the State Department urged the appellate court to reverse. Ignoring the requirements of modern law enforcement, the diplomats claimed that principles of "international comity" should control the outcome here. This yawning conceptual gap further highlights the urgent need for this Court's intervention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

[PUBLISH]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-17213

D. C. Docket No. 04-23223-CV-MGC

[Filed June 18, 2010]

JOSE GUEVARA,	)
	)
Plaintiff-Counter-Defendant-Appellee Cross-Appellee,	)
	)
LUIS ALFREDO PERCOVICH,	)
	)
Proposed Intervenor-Appellant,	)
	)
versus	)
	)
REPUBLIC OF PERU, MINISTERIO DEL INTER,	)
	)
Defendants-Counter-Claimants Cross-Appellants,	)

ANTONIO KETIN VIDAL, individually, FERNANDO ROSPIGLIOSI, individually, DEPARTMENT OF JUSTICE,

Defendants.

Appeals from the United States District Court for the Southern District of Florida

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(June 18, 2010)

Before TJOFLAT and COX, Circuit Judges, and KORMAN,* District Judge.

TJOFLAT, Circuit Judge:

The Republic of Peru, two of its ministries, and two of its government officials (collectively "Peru") appeal the district court's award of summary judgment to Jose Guevara on Guevara's claim that Peru owed him $5 million in reward money for information that lead to the arrest of Peru's former spy chief, Vladimiro Lenin Montesinos Torres ("Montesinos"). Peru contends that the district court should have recognized its sovereign immunity and therefore dismissed Guevara's claim for lack of subject matter jurisdiction. Luis Alfredo Percovich appeals the district court's denial of his motion to intervene in the case (after the

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* Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

court granted Guevara's motion for summary judgment but prior to its entry of final judgment) for the purpose of claiming the award.[1] We agree with Peru that the district court lacked subject matter jurisdiction and therefore reverse its judgment and remand the case with the instruction that it be dismissed without prejudice.

I.

A.

This case's facts read like the latest spy thriller. An earlier, and partial, recitation of the facts appears in this court's opinion in Guevara v. Republic of Peru, 468 F.3d 1289 (11th Cir. 2006) ("Guevara I"), which we recite in this subpart. In the 1990s, Montesinos was the head of Peru's National Intelligence Agency. During that time, while discharging the duties of his office, he purportedly committed several crimes—arms trafficking, drug dealing, money laundering, extortion, bribery, and "more than a few murders." Id. at 1292. The Peruvian media obtained videotapes of his participation in some of these crimes, including bribery, and after the videotapes became public, President Alberto Fujimori announced in September 2000 that he would dissolve the intelligence agency and step down as president. Montesinos, seeing the writing on the wall, fled the country, first into Venezuela, then, it seemed, into thin air.

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[1] Percovich filed his notice of appeal first. Peru followed several days later. Peru's appeal is therefore a cross-appeal. We refer to the cross-appeal as the appeal because our disposition of it renders Percovich's appeal effectively moot.

A manhunt ensued, and in April 2001, Peru's Interim President, Valentin Corazao, issued an Emergency Decree that provided for a $5 million reward for the "person or persons who provide(s) accurate information that will directly enable locating and capturing" Montesinos. Id. at 1293.[2] The decree established a committee, the Special High Level Committee ("SHLC"), as part of the Ministry of the Interior to receive such information and assess its accuracy.[3] The decree authorized the Peruvian government to obtain a loan from a Peruvian bank to pay the reward, with the funds to be deposited in a Peruvian account in the interim. The reward would be paid twenty-four hours after Montesinos's capture.[4]

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[2] The Emergency Decree was posted on the website of Peru's official daily publication, El Peruano.

[3] The Emergency Decree itself was attached to Guevara's motion for summary judgment, which, as discussed infra, he filed in the district court after remand in Guevara I. The certified court translator noted that Peru's Ministry of the Interior is equivalent to the United States Department of Homeland Security. We assume, therefore, that Peru's Minister of the Interior, to whom we refer throughout the opinion, holds a position comparable to the United States' Secretary of Homeland Security.

[4] As stated in Guevara I,

> Article One of [the Emergency Decree] provided that Peru thereby:
>
> > Establish[ed] a financial reward in the amount of U.S. $5,000,000.00 (FIVE MILLION 00/100 UNITED STATES DOLLARS), which shall be given to the person or persons who provide(s) accurate information that will directly enable locating and capturing Vladimiro Lenin Montesinos Torres. In the event several persons provide

It turned out that Guevara, a Venezuelan national, was providing Montesinos with a hiding place and a security detail in Caracas, Venezuela. In addition, Guevara was handling Montesinos's communications with Pacific Industrial Bank in Miami, Florida, where Montesinos maintained a bank account. When the bank declined his request to transfer his funds to another bank, Montesinos emailed Percovich, the officer assigned to the account, threatening him with physical harm unless the bank honored his request. Montesinos then sent Guevara to Miami with instructions for Percovich. Percovich, aware that Guevara was coming to Miami, contacted the FBI in the meantime to inform them of Montesinos's threat and Guevara's involvement with Montesinos, so when Guevara arrived in Miami in June 2001, the FBI detained him and prepared to charge him with a criminal offense.[5] The FBI informed Guevara that he

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> the said information, the financial reward shall be divided among them.

(Compl. Ex. A). Article Three of the decree defined "accurate information":

> For purposes of this Emergency Decree, accurate information shall be that [information] provided through any means to the Special High Level Committee and which enables locating and capturing Vladimiro Lenin Montesinos Torres, who is wanted.
>
> Id. (bracketed word in original)

Guevara I, 468 F.3d at 1293.

[5] The record before the district court, when it ruled on Guevara's motion for summary judgment following the disposition of Guevara I, reveals that the FBI was in the process of filing a

would not be charged if he disclosed Montesinos's whereabouts. And, if Montesinos was captured, Guevara could claim the $5 million reward Peru had posted.[6]

Guevara cooperated; he revealed Montesinos's location in Caracas and arranged through some of his associates in Caracas for Montesinos to be delivered into the hands of Venezuelan officials. They arrested Montesinos and turned him over to the Peruvian authorities. Peru, however, refused to pay Guevara the $5 million reward.

B.

Guevara sued Peru in Florida state court, and Peru removed the case to the United States District Court for the Southern District of Florida under 28 U.S.C. § 1441(d). Guevara framed his complaint in five counts, as set out in the margin.[7] Peru moved to

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criminal complaint charging Guevara with conspiring with Montesinos to threaten Percovich through a series of emails. The charges were later dismissed due to Guevara's assistance to the FBI in capturing Montesinos.

[6] The FBI was aware of the reward because it had been widely publicized.

[7] Count One alleged breach of contract by the Republic of Peru. Count Two alleged breach of contract implied in law by the Republic of Peru. Count Three alleged breach of contract by the Ministry of the Interior. Count Four alleged fraudulent inducement by the Minister of the Interior during the events leading to Montesinos's capture. Count Five (mislabeled as Count Four) alleged fraudulent misrepresentation by the new Minister

dismiss the case pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602–1611, rendered it immune from suit. The district court granted Peru's motion on the ground that Peru's conduct did not fall under any of the enumerated exceptions to the FSIA's presumption of sovereign immunity. Guevara then appealed the dismissal to this court.

We held that Peru's offer of a reward fell within the FSIA's commercial activity exception.[8] We reasoned that instead of using its own police and investigatory powers to search for Montesinos, Peru "'ventured into the marketplace' . . . to buy the information needed to get its man." Guevara I, 468 F.3d at 1299 (quoting Hond. Aircraft Registry, Ltd. v. Gov't of Hond., 129 F.3d 543, 547 (11th Cir. 1997)). Because sovereign

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of the Interior, who assumed that position when the former minister left office in July 2001.

[8] As detailed infra, the FSIA creates a presumption that foreign sovereigns are immune from suit in U.S. courts unless they fall under an exception within the statute. 28 U.S.C. § 1604. The commercial activity exception prevents a foreign state from claiming immunity in cases

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Id. § 1605(a)(2).

states can engage in commercial activities by contracting with private parties, id. at 1300, and because Peru acted like a private party in entering the market for rewards, id. at 1301, the FSIA's definition of "commercial activity" in 28 U.S.C. § 1603(d) fully encompassed the reward, id. at 1305. In turn, because a state's private, commercial acts divest it of sovereign immunity under the so-called "restrictive theory," id. at 1297, Peru was not immune from suit under the FSIA's exception. We accordingly vacated the district court's judgment and remanded the case for further proceedings.

On remand, the district court issued a new scheduling order and the parties engaged in discovery. At the close of discovery, Guevara moved the court for summary judgment on two counts of his complaint, those claiming breach of contract,[9] arguing that he was entitled to the reward because he had fulfilled the terms of Peru's offer. Deposition and affidavit evidence submitted in support of Guevara's motion had provided new information about Guevara's role in Montesinos's capture. We now recount the facts that evidence established.[10]

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[9] Counts One and Three. See supra note 7. The district court dismissed Count Two on Guevara's stipulation and, in a separate order, granted summary judgment to the two Ministers of the Interior on Counts Four and Five. The parties do not contest that order.

[10] We recount the facts in the light most favorable to Guevara.

C.

Guevara was formerly an officer in the Venezuelan intelligence agency, Dirección Nacional de los Servicios de Inteligencia y Prevención ("National Directorate of Intelligence and Prevention Services") ("DISIP").[11] On December 15, 2000, Guevara received a telephone call from his second cousin asking him to receive a visitor at Guevara's residence in Caracas. Later that day, one Julio Ayala brought a man wearing facial bandages, whom Ayala identified as Manuel Rodriguez, to Guevara's house. Guevara later realized that the man going by the name Manuel Rodriguez was actually Montesinos, who had undergone facial reconstructive surgery to conceal his identity.

Guevara's second cousin asked Guevara to provide ongoing security for Montesinos. Guevara agreed and saw to it that Montesinos was protected while he was in hiding in Caracas.[12] For his part, Montesinos used Guevara as an intermediary to run personal errands and to arrange for the deposit of funds into

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[11] DISIP has since been redesignated as Agencia Bolivariana de Noticias ("Bolivarian Intelligence Service"). Agencia Bolivariana de Noticias, Venezuelan Disip to be now designated as Bolivarian Intelligence Service, http://www.abn.info.ve/noticia.php?articulo=210391 (last visited May 4, 2010).

[12] Two days after receiving Montesinos, Guevara moved Montesinos to the Caracas home of a sister of Jose Luis Nunez, who had previously worked as a bodyguard for Guevara. Nunez apparently did not serve as Montesinos's bodyguard; his role appears to have been limited to providing a hiding place for Montesinos at his sister's home. Approximately three to four weeks prior to his capture, Montesinos moved to Nunez's home for, according to Guevara, "strategic reasons."

Montesinos's accounts in U.S. banks. On June 20, 2001, Guevara traveled to Miami for Montesinos to deliver an envelope to Percovich at Pacific Industrial Bank. The envelope contained a letter instructing Percovich to give Guevara $700,000 cash from Montesinos's account at the bank, and to transfer $3 million from that account to an account Montesinos had opened at another bank.[13] Guevara met Percovich at the Intercontinental Hotel in Miami on June 22 and gave him the envelope. While Guevara was leaving the Intercontinental Hotel, FBI agents arrested him.[14]

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[13] Apparently, the FBI had notified Pacific Industrial Bank of Montesinos's fugitive status, and the bank had frozen Montesinos's account.

[14] On June 24, 2001, an FBI special agent swore out a criminal complaint against Guevara, charging him with violating 18 U.S.C. §§ 875(b), 371, and 2. The complaint charged Guevara with conspiring with Montesinos to threaten Pacific Industrial Bank and its officials, specifically Percovich, with harm if they did not deliver the money in accordance with Montesinos's instruction. Section 875(b) provides that

> [w]hoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 875(b). The alleged § 875(b) violation formed the predicate offense for the § 371 charge. Section 371 reads:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act

After the agents took Guevara into custody, they questioned him briefly at the hotel where he was staying, then moved him to the FBI office in Miami.

The questioning resumed at the FBI office. The agents informed Guevara of the $5 million reward for information that would lead to Montesinos's capture. Guevara decided to cooperate, in that he would give the agents Montesinos's location if the charges were dropped and he received the reward. At this point, Agent Waldo Longa made a telephone call, then told Guevara that if he gave the FBI Montesinos's address and telephone number in Caracas, he would be released, the charges would be dropped, and he would receive the $5 million reward. Guevara agreed to do that, and under the supervision of FBI agents, he called Jose Luis Nunez's residence, where Montesinos was hiding. Guevara briefly spoke with Montesinos and, as the FBI had instructed, told Montesinos that Percovich had received the envelope. The FBI transmitted this information to Venezuelan

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> to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 371. Lastly, § 2 governs accomplice liability:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2.

authorities, who were cooperating with the Peruvian authorities, and developed a plan for Guevara's associates in Venezuela to deliver Montesinos to the Peruvian embassy in Caracas on June 23.[15]

On the evening of June 22, the FBI transferred Guevara to the Federal Detention Center in Miami for overnight custody. The following morning, June 23, the FBI brought Guevara back to its Miami office, where he made more telephone calls to his Venezuelan associates, including Nunez, to coordinate Montesinos's handover to the Peruvian embassy.[16] Nunez assured Guevara that Montesinos would be handed over later that day, and Guevara relayed this assurance to the FBI.

While Guevara was in the FBI office that day, Agent Longa informed Guevara that he had spoken by telephone with the FBI agent responsible for overseeing the FBI interests in Peru, Kevin Currier,[17]

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[15] The FBI did so because, following Montesinos's disappearance and the posting of the $5 million reward, the United States had agreed to cooperate with Peru in trying to locate Montesinos. The plan was developed by Kevin Currier, who was an FBI special agent stationed in Chile, see infra note 17, and FBI agents in Miami.

[16] The record is not clear about the identity of these associates, other than Nunez. We assume Guevara had enlisted others to assist in hiding Montesinos at Nunez's house.

[17] At the time of these events, Kevin Currier was an FBI supervisory special agent and legal attaché stationed at the U.S. embassy in Santiago, Chile. At that post, Currier also had territorial responsibility for the FBI's objectives in Peru. Currier was involved in the case because in December 2000, he had

and with Antonio Ketin Vidal Herrera ("Vidal"), Peru's Minister of the Interior.[18] During the call, Vidal said that Guevara would be eligible to receive the $5 million reward if he gave the FBI Montesinos's location in Caracas. Several hours after this conversation, the FBI asked Guevara to give final instructions to Nunez on where to turn over Montesinos; Guevara complied, and Nunez agreed to the instructions. On June 24, Longa told Guevara that Montesinos had been captured by Venezuelan authorities in Caracas the day before. On June 25, Guevara was released from custody, and the charges against him were dismissed.

D.

Peru responded to Guevara's motion for summary judgment by arguing that based on the facts that had been developed on remand, the district court should dismiss the case on the ground that Peru had not waived its sovereign immunity under 28 U.S.C. § 1605(a). In an order entered on September 9, 2008, the district court rejected the argument, concluding that Guevara I had decided the sovereign immunity issue adversely to Peru.[19] The court therefore

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responded to a request by the U.S. Ambassador to Peru for the FBI's assistance in apprehending Montesinos.

[18] Currier had called Longa from Chile earlier in the day and, after reaching Longa, arranged to have Vidal join their telephone conversation from Peru.

[19] The district court disposed of Peru's sovereign immunity argument with this brief comment: "jurisdiction in this case has been established" by Guevara I.

proceeded to rule on the merits of Guevara's motion for summary judgment. The court held that the Emergency Decree had created a unilateral contract and that Guevara had satisfied the performance the contract called for by providing information that led to Montesinos's capture. Then, relying on an August 5, 2002 SHLC resolution acknowledging that Guevara had provided such information and that the SHLC would evaluate his reward request, the court effectively preempted the SHLC's evaluation decision—concluding that, on the basis of the record before the court, the SHLC was bound to honor Guevara's request and thus to give him the entire $5 million reward.

On September 18, 2008, after the district court had granted Guevara's motion for summary judgment but before it entered final judgment in the case, Percovich moved the court, pursuant to Federal Rule of Civil Procedure 24(a)(2), to grant him intervention as of right as a co-plaintiff, or alternatively, to stay further proceedings in the case. Percovich claimed that he was responsible for causing Guevara to cooperate with the FBI and to reveal Montesinos's whereabouts, and that but for his (Percovich's) cooperation, Montesinos would not have been captured. As a result, Percovich contended, he was entitled to at least a share of the reward, and his rights would go unprotected if he were denied an opportunity to prove his claim to the reward money. The district court denied Percovich's motion on December 1, 2008. On December 17, 2008, the district court entered final judgment in Guevara's favor for $5

million plus pre- and post-judgment interest. Percovich's appeal and Peru's cross-appeal followed.[20]

II.

Peru contends that the district court should have dismissed the case for lack of subject matter jurisdiction on the ground that it is entitled to sovereign immunity under 28 U.S.C. § 1605(a). Assuming that we hold that it was not entitled to sovereign immunity, Peru contends that the district court erred in granting Guevara's motion for summary judgment on the merits. Percovich contends that the court abused its discretion in refusing to grant him intervention as of right. If Peru is entitled to sovereign immunity, the case is due to be dismissed for want of subject matter jurisdiction, and we would be foreclosed from proceeding further. We therefore turn to the question of whether Peru is entitled to sovereign immunity under § 1605(a).

The district court concluded that, in Guevara I, we already resolved this § 1605(a) issue. We disagree. We begin with the proposition that the FSIA "provides the sole basis for obtaining subject matter jurisdiction over a foreign sovereign in the United States," Guevara I, 468 F.3d at 1294, and grants original jurisdiction over nonjury civil actions against foreign states, 28 U.S.C. § 1330(a).[21] The exercise of that jurisdiction is limited

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[20] We have jurisdiction of the appeal from the district court's final judgment under 28 U.S.C. § 1291.

[21] This section provides:

> The district courts shall have original jurisdiction without

to the FSIA's exceptions to the general rule that foreign sovereigns enjoy immunity from suit in United States courts. Id.; see also id. § 1605(a). Section 1605, "General exceptions to the jurisdictional immunity of a foreign state," provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state

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regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

28 U.S.C. § 1330(a).

> elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605.

In Guevara I, Guevara appealed the district court's decision that Peru was entitled to sovereign immunity because its offer of a reward did not constitute "a commercial activity." In reaching its decision, the district court bypassed the question of whether, assuming that the offer of a reward constituted a commercial activity, Peru established that it had immunity under subsection (a)(2). In appealing the district court's decision, Guevara, in his opening brief, focused his argument for reversal solely on the commercial activity issue. Peru, in its answering brief, did the same. Its brief did not seek affirmance on the additional ground the district court had not reached: whether it had immunity under subsection (a)(2).

Guevara I thus resolved the issue Guevara had raised—whether Peru's offer of a reward was a commercial activity—and resolved it against Peru. In doing so, the court left open, albeit implicitly, the question of whether the district court had subject matter jurisdiction to entertain Guevara's case. Guevara I, 468 F.3d at 1305 ("If the court finds that it does not have subject matter jurisdiction, 'the court's sole remaining act is to dismiss the case for lack of jurisdiction.'") (quoting Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1261 (11th Cir. 2000)).

In holding that Guevara I resolved the sovereign immunity issue against Peru, the district court was, in effect, invoking the law of the case doctrine.

> The law of the case doctrine is not an "inexorable command," White v. Murtha, 377 F.2d [428,] 431 [(5th Cir. 1967)], but rather a salutary rule of practice designed to bring an end to litigation, id., discourage "panel shopping," Lehrman v. Gulf Oil Corp., 500 F.2d 659, 662 (5th Cir. 1974), cert. denied, 420 U.S. 929, 95 S.Ct. 1128, 43 L.Ed.2d 400 (1975), and ensure the obedience of lower courts. United States v. Williams, 728 F.2d 1402, 1406 (11th Cir. 1984). As with the mandate rule, the law of the case doctrine applies to all issues decided expressly or by necessary implication; it does not extend to issues the appellate court did not address. Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 19 (5th Cir.[1974]), cert. dismissed, 419 U.S. 987, 95 S. Ct. 246, 42 L. Ed. 2d 260 (1974); Fogel v. Chestnutt, 668 F.2d 100 (2d Cir.1981), cert. denied, 459 U.S. 828, 103 S. Ct. 65, 74 L. Ed. 2d 66 (1982).

Piambino v. Bailey, 757 F.2d 1112, 1120 (11th Cir. 1985).

In light of the parties' Guevara I briefs on appeal and the court's statement that the district court must dismiss the case "if it does not have subject matter jurisdiction," we could hardly say that Guevara I decided all of the sovereign immunity issues § 1605(a)(2) presents. We therefore conclude that those issues—with the exception of whether the offer of a reward constituted "a commercial activity"—remain for decision here. We now address them de novo. Venus Lines Agency v. CVG Industria Venezolana De Aluminio, C.A., 210 F.3d 1309, 1311 (11th Cir. 2000) (per curiam).

Section 1605(a)(2) lists three exclusive bases, or nexuses, for a foreign state's commercial activities to subject it to the United States courts' jurisdiction: in cases (1) based upon commercial activities within the United States, (2) based upon acts performed in the United States "in connection with" commercial activity elsewhere, or (3) based upon acts performed in connection with commercial activity elsewhere that cause a "direct effect" in the United States. See Samco Global Arms, Inc. v. Arita, 395 F.3d 1212, 1216 & n.8 (11th Cir. 2005).

The district court did not analyze whether Peru's activity fell under any of the three bases for jurisdiction in § 1605(a)(2) because it apparently assumed that Guevara I had performed the analysis. Guevara I, however, merely held, as we observed above, that Peru's reward offer constituted commercial activity. It held nothing regarding the existence of subject matter jurisdiction, and, in fact, the opinion implicitly recognized the possibility that the district court could discover a lack of subject matter jurisdiction later in the case.[22] We now embark on the task the district court assumed Guevara I had undertaken: whether Peru was subject to the district court's jurisdiction under one or more of the three jurisdictional nexuses of § 1605(a)(2). In carrying out this task, we rely on the record before the district court when it entertained and granted Guevara's motion for

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[22] The Guevara I opinion did not discuss the nexus requirement of 28 U.S.C. § 1605(a), and after reviewing the parties' Guevara I briefs, we find that the parties did not present the nexus issue to the court in the context of subject matter jurisdiction. We thus reject Guevara's argument that Guevara I decided the nexus issue "by implication."

summary judgment.[23] More to the point, we consider the evidence that bears on § 1605(a)(2)'s three jurisdictional nexuses.

The evidence bearing on the first nexus, commercial activities within the United States, establishes that no such activities occurred in the United States. Rather, the commercial activity in this case, described by Guevara I as an "offer of a reward for information enabling the capture of a fugitive," 468 F.3d at 1301, took place in Peru.[24] First, the Emergency Decree, which created the offer, was published in an official publication in Peru. Second, the Decree established the SHLC to evaluate the veracity of information leading to Montesinos's arrest and decide whether to pay the reward. If the SHLC decided to pay the reward, the payment would be made in Peru from funds the Peruvian government had placed in escrow in a Peruvian bank. In short, all of the SHLC's commercial activity would take place in Peru. Although information leading to Montesinos's capture might be provided by someone in the United

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[23] As stated in note 10, supra, we consider the evidence in that record in the light most favorable to Guevara. We do so because it is Peru's burden to demonstrate the lack of subject matter jurisdiction in the context presented here.

[24] Under the FSIA, "commercial activity" is

> either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d).

States, as it was here, the act of providing the information to the SHLC would not be part of the commercial activity.[25] Therefore, by offering the reward, Peru was not waiving its sovereign immunity from suit in the United States by a person who may have provided information that led to Montesinos's capture.

Next, the evidence bearing on the second nexus, acts committed by Peru in the United States "in connection with" commercial activity elsewhere, established that on June 23, Currier (in Chile) placed a long distance telephone call to Longa (in Miami) and to Vidal (in Peru). During the call, Vidal told Longa that Guevara would receive the reward if he provided information that led to Montesinos's capture. The narrow question here is whether Vidal's act of communicating these words to Longa in Miami constituted an act performed in the United States "in connection with" Peru's offer of the reward in Peru and, thus, was sufficient to waive Peru's sovereign immunity under the second nexus.

The SHLC was a special committee of the Ministry of the Interior. Vidal was the Minister of the Interior; we thus assume that he had supervisory authority over the SHLC. Vidal's statement to Longa was a statement he would have made to anyone professing to have information that might lead to Montesinos's capture: "If you believe that your information has led

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[25] If the person providing the information was an agent of the Republic of Peru located in the United States, one could argue that such provision constituted commercial activity by Peru in the United States. See 28 U.S.C. § 1603(e). But that is not the case here.

to Montesinos's capture, you may submit it to the SHLC. If the SHLC determines that it is reliable, you will receive the reward. If similar information is submitted to the SHLC by others and found reliable, they will share in the reward."

If what Vidal said to Longa constituted an act in connection with Peru's offer of the reward, then almost any statement he may have made about the reward to anyone else in the United States would have operated to waive Peru's immunity from suit. We are reluctant to find a waiver based on such de minimis evidence.

The federal courts' application of § 1605's exceptions to sovereign immunity supports our position. For example, section 1605(a)(1) provides that a foreign state shall not be immune in any case "in which [it] has waived its immunity either explicitly or by implication." In Creighton Ltd. v. Government of the State of Qatar, 181 F.3d 118, 122 (D.C. Cir. 1999), the court stated that

> implicit in § 1605(a)(1) is the requirement that the foreign state have intended to waive its sovereign immunity. See Princz v. Federal Republic of Germany, 26 F.3d 1166, 1174 ([D.C. Cir.] 1994) ("[A]n implied waiver depends upon the foreign government's having at some point indicated its amenability to suit"); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 444 (D.C. Cir. 1990) ("courts rarely find that a nation has waived its sovereign immunity . . . without strong evidence that this is what the foreign state intended").

The offer of the reward was made in Peru and was to be administered in Peru by the SHLC. We assume, for purposes of this case, that Vidal, by virtue of his position as Minister of the Interior, had the authority to waive the state's immunity.[26] That said, we are unwilling to hold that Vidal intended to waive Peru's sovereign immunity via the solitary act of telling a person in the United States what he must do to obtain the reward.

Lastly, the evidence bearing on the third nexus had to establish that Peru's actions "in connection with" commercial activity outside the United States caused "a direct effect" within the United States. To be direct, an effect must follow "as an immediate consequence of the defendant's activity." Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 618, 112 S. Ct. 2160, 2168 (1992) (quotation and ellipses omitted). As we have framed it, "the question presented is, 'was the effect sufficiently "direct" and sufficiently "in the United States" that Congress would have wanted an American court to

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[26] Guevara also filed a declaration purporting to show two pieces of evidence that Peru committed acts in the United States in connection with commercial activity in Peru: first, that Vidal traveled to Miami in July 2001, after Montesinos had been apprehended, to personally thank Guevara for his assistance and to confirm that Guevara would receive the reward, and second, that in February 2002, Guevara met in Miami with a Peruvian judge and prosecutor who allegedly had been asked by the then-Minister of the Interior, Fernando Rospigliosi, to tell Guevara that Peru would pay him the reward. Even if we believed that this scant evidence was sufficient to overcome the heavy burden required to show that Peru waived its sovereign immunity (and we do not), Guevara's declaration is a classic unsworn, self-serving statement that would be inadmissible if offered at trial.

hear the case?'" Harris Corp. v. Nat'l Iranian Radio & Television, 691 F.2d 1344, 1351 (11th Cir. 1982) (quoting Tex. Trading & Milling Corp. v. Fed. Republic of Nig., 647 F.2d 300, 313 (2d Cir. 1981)).

In Harris, an American manufacturer of FM transmitters (Harris Corporation) sued to enjoin payment on a letter of credit that an Iranian state bank extended to Harris Corporation as part of a performance guarantee in favor of an Iranian broadcaster. Harris Corporation contended that the letter of credit and associated performance guarantee had been terminated by force majeure—namely, the 1979 Iranian revolution. The guarantee was an integral part of the contract between Harris Corporation and the Iranian broadcaster, and was backed by a standby guarantee that required Harris Corporation to indemnify Continental Bank, which would reimburse the Iranian bank if the latter had to pay on the first letter of credit. Harris Corporation sought to enjoin the Iranian bank's receiving payment from Continental Bank because in the injunction's absence, Harris Corporation would have been obligated to indemnify Continental Bank to the extent it reimbursed the Iranian bank's payment on the original letter of credit. The district court granted the injunction, and, on appeal, the Iranian bank argued that the district court lacked subject matter jurisdiction under the FSIA. In rejecting that argument, this court held that the letter of credit arrangement "extend[ed] into this country, and the appellants' demands thus ha[d] significant . . . financial consequences here," establishing a direct effect for purposes of § 1605(a)(2). Harris Corp., 691 F.2d at 1351.

Here, Guevara presents two ways in which direct effects in the United States flowed from Peru's promise to pay the reward in Peru, neither of which we find persuasive. First, he argues that he accepted the reward offer while in custody in Miami, creating a direct effect in the United States. The record, however, indicates that the extent of Guevara's acceptance-related activity was the alleged, one-off telephone communication between Vidal, Currier, and Longa. In the context of personal jurisdiction, however, we have rejected the argument that one telephone call is sufficient to create minimum contacts with the forum state, see Future Tech. Today, Inc. v. OSF Healthcare Sys., 218 F.3d 1247, 1251 (11th Cir. 2000); cf. Sculptchair, Inc. v. Century Arts, Ltd., 94 F.3d 623, 628 (11th Cir. 1996) (rejecting, as a basis for jurisdiction under Florida's long-arm statute, "a series of telephone conversations" and a one-hour meeting between the Canadian defendant and the plaintiff's Florida office), and we find the same reasoning applicable here. At oral argument, moreover, counsel for Guevara conceded that the primary activity for purposes of § 1605(a)(2)'s analysis was really Peru's failure to make the reward payment within the United States—a sort of "negative activity." We are unaware of any federal court holding that such "negative activity" satisfies the jurisdictional requirements of § 1605(a)(2), and we decline to reach that holding here.

Second, Guevara argues that his arrest in the United States constituted a direct effect in the United States of SHLC's commercial activity in Peru. The FBI arrested Guevara because he was participating in the execution of Montesinos's threats of physical harm to Percovich if Percovich did not handle Montesinos's bank deposits as instructed. Guevara's arrest was "an

immediate consequence" of his criminal activity, not of Peru's offer of a reward for Montesinos's capture. Only after Guevara was arrested and agreed to cooperate with investigators did the availability of reward money come into play.[27]

Neither of Guevara's arguments for a direct effect in the United States reflects Weltover's requirement of immediate consequences or Harris Corp.'s focus on significant financial consequences in the United States. Therefore, we cannot conclude that a direct effect occurred in the United States as a result of Peru's promise to pay the reward money.

III.

Guevara I did not resolve in full the jurisdictional issues presented by 28 U.S.C. § 1605(a)(2). Accordingly, the district court should have determined whether Peru was subject to the court's subject matter jurisdiction because Peru failed to establish that its commercial activity fell under one of the § 1605(a)(2) nexuses for jurisdiction. The court failed to do so. This left us with two possible dispositions: (1) remand the case to the district court with the instruction that it resolve the § 1605(a)(2) issues, or (2) resolve those issues on appeal because the appropriate disposition is clear. We have chosen the latter course. We REVERSE

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[27] We also note Vidal's testimony that neither he nor members of the Peruvian government contacted United States law enforcement officials directly to effectuate Montesinos's capture. The extent of Peruvian involvement with United States law enforcement, Vidal testified, was as part of a request to several intelligence organizations and law enforcement agencies worldwide to assist in the search for Montesinos.

the district court's judgment and REMAND the case with the instruction that the case be dismissed without prejudice.

SO ORDERED.

COX, Circuit Judge, dissenting:

The majority opinion rests on a faulty premise: that, in deciding the prior appeal in this case, this court did not decide whether Peru is entitled to sovereign immunity. The court holds that *Guevara I* decided only the question of whether Peru's offer of the reward constituted commercial activity. But that is incorrect. *Guevara I* held that FSIA's commercial activity exception applies to exempt Peru from the general immunity granted by the statute to foreign sovereigns. 468 F.3d at 1292 ("This appeal presents the issue of whether a foreign state's offer of a reward in return for information enabling it to locate and capture a fugitive falls within the Foreign Sovereign Immunities Act's commercial activity exception to sovereign immunity. For the reasons that follow, we conclude that it does."); *id.* at 1299 ("The question in this appeal is whether Guevara can use the courts of this country to compel Peru to keep its contractual promise to pay him the money it offered.").

The commercial activity exception states:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case–
>
> . . . .

> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]

28 U.S.C. § 1605(a)(2). In deciding that the statutory exception applies to Peru's actions, the *Guevara I* court decided more than that Peru had engaged in commercial activity; the court necessarily decided that a nexus existed between that commercial activity and the United States. It implicitly held that the commercial activity was carried on in the United States, that an act was performed in the United States in connection with commercial activity elsewhere, or that a direct effect of the commercial act was caused in the United States.

Most importantly, the *Guevara I* court explicitly decided that there was no immunity available to Peru under the FSIA. In explaining that the individual defendants were not entitled to sovereign immunity because any such immunity would be derivative of the sovereign state's immunity, the opinion says:

> There is no present need to review the district court's conclusion that the individual defendants were acting within the scope of their authority. Even if they were, they are not

> entitled to sovereign immunity because the sovereign itself is not.

Guevara I, 468 F.3d at 1305 (emphasis added).

Guevara I did not implicitly leave open the question of subject matter jurisdiction, remanding the case for the district court to decide that question. In claiming that it did, the majority opinion takes a statement in the *Guevara I* opinion out of context. *Guevara I* reversed the district court's dismissal of the case on subject matter jurisdiction grounds and remanded the case with the sole instruction that personal jurisdiction over the individual defendants could be examined by the district court. *Id.* at 1305-06. In explaining what the district court had already done and why the district court had not considered the personal jurisdiction arguments of the individual defendants, the *Guevara I* opinion said, "If the court finds that it does not have subject matter jurisdiction, 'the court's sole remaining act is to dismiss the case for lack or jurisdiction.'" *Id.* at 1305 (citations omitted).[28]

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[28] The full section of the opinion containing the quoted statement reads as follows:

> The individual defendants contend that we ought to affirm the judgment dismissing them from the lawsuit anyway, on the ground that the district court lacked personal jurisdiction over them. The district court, having found that they were entitled to sovereign immunity, dismissed their challenge to personal jurisdiction as moot. That result followed from the district court's conclusion that the defendants were immune under the FSIA, which limits the subject matter jurisdiction of the federal courts. 28 U.S.C. § 1604 (stating that if the Act applies, "a foreign state shall be

Contrary to the majority opinion's assertion, the quoted statement is not an indication to the district

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immune from the jurisdiction of the courts of the United States"). "[A] court should inquire into whether it has subject matter jurisdiction at the earliest possible stage in the proceedings." *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999). If the court finds that it does not have subject matter jurisdiction, "the court's sole remaining act is to dismiss the case for lack of jurisdiction." *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1261 (11th Cir. 2000).

Because we disagree with the district court that the FSIA bars Guevara's suit, the individual defendants' motion to dismiss for lack of personal jurisdiction is again relevant. However, the district court should have the first opportunity to resolve it. Defendants cite *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 63 S. Ct. 454, 459, 87 L. Ed. 626 (1943), for the proposition that we must affirm the decision of a district court if it reached the correct result but for the wrong reason. The *Chenery* case notes that this rule does not apply "where the correctness of the lower court's decision depends upon a determination of fact." *Id.* Our own decisions are to the same effect. *See Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1372 n.5 (11th Cir. 1998) ("We are mindful of the general rule that a court of appeals will not consider issues not reached by the district court, especially where the issues involve questions of fact."); *Stewart v. Dep't of Health and Human Servs.*, 26 F.3d 115, 115-16 (11th Cir. 1994) (same). The "minimum contacts" prong of the personal jurisdiction inquiry is necessarily case and fact specific. We decline to take up that issue without the benefit of factfindings from the district court. Vidal and Rospigliosi may reassert on remand the issue of the district court's jurisdiction over their persons.

Guevara I, 468 F.3d at 1305-06.

court that, on remand, it should reconsider subject matter jurisdiction.

Guevara I's holding that the commercial activity exception to sovereign immunity applies to Peru's activities is a holding that subject matter jurisdiction exists over this case pursuant to the FSIA. That is the law of this case, notwithstanding the fact that the *Guevara I* opinion did not explicitly address the nexus between Peru's commercial activities and the United States. *See EEOC v. Int'l Longshoremen's Ass'n*, 623 F.2d 1054, 1058 (5th Cir. 1980) (noting that the law of the case doctrine applies to "things decided by necessary implication as well as those decided explicitly.") (quotation and citation omitted); *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as precedent decisions of the Former Fifth Circuit handed down prior to the close of business on September 30, 1981). The district court did not err in so finding, and this panel cannot properly revisit the question. *See Free v. Abbott Labs., Inc.*, 164 F.3d 270, 272-273 (5th Cir. 1999)[29] (joining other circuits in refusing to recognize a "jurisdiction exception" to the law-of-the-case doctrine; explaining that although a federal court must examine each case to determine whether it has subject-matter jurisdiction, this does not require "perpetual re-examination of precisely the same issue of subject matter jurisdiction"); *see also McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 350 (D.C. Cir.1995) (applying the law-of-the-case doctrine to a prior appeals panel's ruling concerning the existence

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[29] Affirmed by an equally divided court, 529 U.S. 333, 120 S. Ct. 1578 (2000).

of subject matter jurisdiction); *Hanna Boys Center v. Miller*, 853 F.2d 682, 686 (9th Cir. 1988) (same).

Although I disagree with the majority's conclusion that the FSIA bars Guevara's suit, I have reservations about the propriety of resolving this dispute in the courts of this country. Dismissal pursuant to the discretionary doctrine of international comity, rather than dismissal for want of jurisdiction, may be the appropriate way to dispose of this case.[30] The Peruvian government created the reward and the Special High Level Committee charged with administering the reward. After considering Guevara's claim to the reward, the Committee rejected his claim. I suspect it would violate international comity for United States courts to review that decision.

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[30] International comity is an abstention doctrine. "A federal court has jurisdiction but defers to the judgment of an alternative forum." *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237 (11th Cir. 2004) (citing *Turner Entm't Co. v. Degeto Film*, 25 F.3d 1512, 1518 (11th Cir. 1994)).

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

CASE NO. 04-23223-CIV-COOKE/BANDSTRA

[Filed September 9, 2008]

JOSE GUEVARA,	)
	)
Plaintiff,	)
	)
v.	)
	)
REPUBLICA DEL PERU, *et al.*,	)
	)
Defendants.	)
	)

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNTS I AND II OF THE COMPLAINT AND DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

This matter is before me on Plaintiff's Motion for Partial Summary Judgment as to Counts I and II of the Complaint [D.E. 119] and the Peruvian Government's Cross Motion for Summary Judgment [D.E. 203]. Plaintiff's Motion for Partial Summary Judgment is granted as there are no genuine issues of

fact regarding whether Plaintiff Jose Guevara ("Guevara") enabled Montesino's capture.

I. BACKGROUND

This is a lawsuit to collect a $5,000,000.00 reward offered by Defendant Peru ("Peru") in exchange for information leading to the capture and arrest of an international fugitive, Vladimiro Lenin Montesinos Torres ("Montesinos"). Guevara alleges that he accepted the reward by providing Peru with accurate information and assistance that led to the location and capture of Montesinos under the terms of Peru's offer. Guevara, however, was never paid the reward.

Montesinos served as presidential adviser and head figure of the National Intelligence System of Peru during the 1990s. During that time, Montesinos organized a net of corruption covering a wide spectrum of illicit activities, including arms trafficking, drug dealing, money laundering, extortion, and murder. After a public corruption scandal led to a change in Peru's government, Montesinos went into hiding in October 2000. In April 2001, Peru enacted Emergency Decree No. 049-2001. Under the Decree, Peru offered a reward of $5,000,000.00 to anyone who could provide information enabling the location and capture of Montesinos. In December 2000, the United States Ambassador to Peru contacted Special Agent Kevin Currier ("Currier") and communicated Peru's request for the Federal Bureau of Investigations' ("FBI") assistance in locating and apprehending Montesinos.

Since December 16, 2000, Guevara had been providing private security and shelter to Montesinos in Venezuela. In June 2001, Guevara traveled to Miami,

Florida to attend a meeting on behalf of Montesinos. On June 22, 2001, while in Miami, Guevara was taken into custody by FBI agents. After Guevara was taken into custody in Miami, and upon learning of Guevara's willingness to cooperate with the FBI to apprehend Montesinos, Special Agent Currier formulated a plan for the capture of Montesinos. On June 23, 2001, Currier met with Peru's then Minister of the Interior, Antonio Ketin Vidal ("Ketin Vidal") regarding the search for Montesinos. Currier informed Ketin Vidal of Guevara's capture and of his willingness to cooperate in locating Montesinos and delivering him to Peruvian authorities. Currier and Ketin Vidal reached agreement on a plan for using Guevara's cooperation to have Montesinos delivered to the Peruvian ambassador's residence in Caracas, Venezuela. This plan included offering Guevara the $5,000,000.00 reward offered by Peru for information resulting in the location and capture of Montesinos. Ketin Vidal subsequently informed Currier that he had spoken with Peru's interim President, Valentin Paniagua, who approved the operation, including the reward offer to Guevara.

On Currier's instructions, and with Ketin Vidal's express approval, Special Agents Longa and Bob Jones relayed the offer to Guevara in Miami. FBI Special Agent Waldo Longa informed Guevara that if he agreed to help the FBI locate and apprehend Montesinos, he would be released, all charges against him would be dropped, and he would be eligible for the $5,000,000.00 reward offered by Peru. Upon learning of the reward offer, Guevara provided the FBI with information on Montesinos's whereabouts. Guevara also made telephone calls (monitored by the FBI on Peru's behalf) to his compatriots in Venezuela to

coordinate Montesinos's delivery into custody. Guevara contends that, as a result of his cooperation, Montesinos was captured and arrested by Venezuelan authorities on the evening of June 23, 2001.

Ketin Vidal traveled to Miami, Florida, and requested a meeting with Guevara. On July 10, 2001, Guevara met with Ketin Vidal, Alfredo Ferreiro (then Consul General of Peru in Miami), and Special Agent Longa in Miami. Guevara alleges that, during the meeting, Ketin Vidal thanked Guevara on behalf of Peru for providing the information and assistance that enabled Montesinos' location and capture. Guevara also alleges that, during this meeting, Ketin Vidal reaffirmed Peru's commitment to pay Guevara the reward in Miami, Florida.

In February 2002, Guevara met with Magali Bascones, a Peruvian judge, in Miami. Judge Bascones flew to Miami and met with Guevara at the FBI's Miami South Division offices. Jose Ugaz, the prosecutor assigned to the Montesinos public corruption investigation in Peru, also attended this meeting. Both Bascones and Ugaz allegedly told Guevara that Fernando Rospigliosi, then Peru's Minister of the Interior, had asked them to tell Guevara that Peru would pay him the $5,000,000.00 reward. According to Guevara, Special Agent Currier subsequently followed up with a number of Peruvian officials, each of whom assured Currier that Ketin Vidal had acknowledged that Guevara was entitled to the reward.

In a Resolution dated August 5, 2002, the Special Committee in Peru created by the Emergency Decree to administer the reward stated:

WHEREAS:

On June 23, 2001 Venezuelan national Jose Guevara provided information leading to the location and capture of Vladimiro Lenin Montesinos Torres to the Chair of the Special High Level Committee of the Department of Homeland Security at the time, PNP Lieutenant General Antonio Ketin Vidal Herrera for the purpose of receiving the financial reward stipulated in Emergency Decree No. 049-2001:

Mr. Jose Guevara made his request by and through his attorney, set forth in briefs sent to this Committee on February 6 and 19, 2002;

The request made by Mr. Jose Guevara is in keeping with the procedure stipulated in Emergency Decree No. 049-2001, issued on April 16, 2001;

The Special High Level Committee of the Department of Homeland Security must decide the request made by Mr. Jose Guevara base [sic] on the analysis of the facts set forth in his request;

DECIDES:

To authorize processing of the request filed by Mr. Jose Guevara for evaluation by the Special High Leval Committee of the Department of Homeland Security.

As of today, Peru has not paid Guevara.

II. LEGAL STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). According to the U.S. Supreme Court, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. . . [o]nly when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324. Thus, the nonmoving party "'may not rest upon the mere allegations or denials of his pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1984) (stating"[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts"). The Court, however, must view the evidence in the light most favorable to the nonmoving party, and summary

judgment is inappropriate where a genuine issue of material fact remains. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Furthermore, the court may not weigh conflicting evidence to resolve disputed factual issues; if a genuine dispute is found, summary judgment must be denied. *Skop v. City of Atlanta, GA*, 485 F.3d 1130, 1140 (11th Cir. 2007) (citing *Carlin Commc'n, Inc. v. S. Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1356 (11th Cir. 1986)).

III. DISCUSSION

A. There Are No Genuine Issues of Material Fact for Trial

The parties agree that Peru's offer of a reward in exchange for information was an offer to enter into a unilateral contract. *See Ballou v. Campbell*, 179 So. 2d 228, 229 (Fla. 2d DCA 1965) ("A unilateral contract is one in which no promisor receives a promise as consideration for his promise."). The only consideration necessary in a unilateral contract is the offeree's performance. *Id.* Once the offeree performs, the offeree has accepted the offer, thereby creating a contract that binds the offeror. *Id.* Peru's Emergency Decree No. 049-2001 offered a reward of $5,000,000.00 for information enabling the location and capture of Montesinos. All that remained for completion of the contract was for someone to perform the terms of the offer by providing such information. Guevara argues that the Emergency Decree constituted a unilateral offer that became a completed contract upon Guevara's delivery of information and cooperation in the capture of Montesinos. As evidence that he delivered information that enabled Peru to locate and capture Montesinos, Guevara points to the August 5, 2002

Resolution and the sworn declaration of Special Agent Currier. Peru, on the other hand, argues that the Resolution only authorizes the processing of Guevara's claim and that Currier's declaration is not entirely based on personal knowledge.

The August 2002 Resolution supports the entry of summary judgment in favor of Guevara as it declares that Guevara provided information leading to the location and capture of Montesinos. Peru attempts to read ambiguities into the Resolution by arguing that it only authorizes the processing of Guevara's claim. It further argues that, because the Special Committee is only authorizing the processing of the claim, it could not have already analyzed the facts underlying the claim. The plain language of the Resolution makes it clear, however, that the Special Committee had already found that Guevara provided information leading to the location and capture of Montesinos and was only determining whether to pay him.

Furthermore, Currier's declaration establishes that Guevara provided the information Peru needed to capture Montesinos. Peru's claims that the declaration is not based on personal knowledge is unfounded. Currier begins his declaration by stating that, in December 2000, the United States Ambassador to Peru personally contacted him and requested the F.B.I's assistance in locating and apprehending Montesinos. Currier Decl. at 1-2. In early June 2001, Currier learned that agents Longa and Jones had arrested Guevara on June 22, 2001 and that Guevara agreed to cooperate with the agents to apprehend Montesinos. *Id.* at 2. Currier further declares that he, along with the Miami agents, formulated a plan to capture Montesinos who, Guevara told them, was hiding in

Caracas, Venezuela. *Id.* The following day, Currier, accompanied by the United States Embassy's Charge d'Affaire, met with Ketin Vidal to discuss the search for Montesinos. *Id.* During that Meeting, Currier proposed to Ketin Vidal that Guevara's associates in Venezuela deliver Montesinos to Peru's embassy in Venezuela. Ketin Vidal proposed instead that Guevara's men deliver Montesinos to the Peruvian amabassador's residence in Caracas. *Id.* at 3. Currier and Ketin Vidal also discussed putting the $5,000,000.00 reward on the table for Guevara and his group so long as Guevera provided information leading to the location and capture of Montesinos. *Id.* With Ketin Vidal's express approval, Currier contacted Special Agents Jones and Longa in Miami and asked them to inform Guevara that, in exchange for his cooperation, Peru would offer him the $5,000,000.00 reward. *Id.* In response, Guevara provided the information and assistance that led to Montesinos's capture and arrest by Venezuelan authorities the evening of June 23, 2001. *Id.*

Peru has not provided any evidence to dispute the Resolution and Currier's declaration and, therefore, has not created a genuine issue of fact as to how Montesinos was captured. In defending against this motion, Peru rests solely on their representation that Montesinos was captured by Venezuelan authorities. Peru does not even explicitly contend that the Venezuelan authorities captured Montesinos with information obtained through another source other than Guevara. Under the decree, however, Guevara did not have to deliver Montesinos to Peru to receive the award. Guevara only had to provide information leading to his capture. Venezuela's capture of Montesinos does not, therefore, defeat Guevara's

entitlement to the award. In the absence of evidence to the contrary, it appears that Venezuela learned of Montesinos's location from Guevara and would have been unable to capture him had Guevara not cooperated.

Ketin Vidal's and Rospigliosi's depositions are not inconsistent with Guevara's version of what transpired between the parties. Neither Ketin Vidal's nor Rospigliosi's deposition testimony establish that Venezuela captured Montesinos without the information provided by Guevara. Rospigliosi merely states that he does not know whether Peru knew Montesinos's whereabouts independent of Guevara and that he believed that Guevara's petition for the reward did not have merit. Rospigliosi Dep. at 50-51. Rospigliosi explains that Guevara's petition did not have merit because the Venezuelan government captured Montesinos. *Id.* at 52. Again, without explaining the source of the Venezuelan government's information regarding Montesinos's location, it appears that Venezuela learned of Montesinos's location from Guevara.

At his deposition, Ketin Vidal denies having ever met with or spoken to the FBI in Peru or Miami about the reward offer. He does, however, admit to meeting with two officials of the U.S. Embassy in Lima on June 23, 2001 regarding the search for Montesinos. Statement of Material Facts in Dispute of the Republic of Peru and Ministry of Interior of Peru at 2. This is the same day that Currier alleges he met with Ketin Vidal. It, therefore, appears that Ketin Vidal met with Agent Currier from the FBI, but was merely under the impression that Currier was an official of the U.S. Embassy in Lima. Ketin Vidal also testified that he

learned of Montesinos's capture through the statements made by Hugo Chavez, President of Venezuela. This statement does not show that Guevara did not provide the information that Venezuela used to locate Montesinos. Accordingly, Peru has not brought forth evidence to show that there exists a genuine issue of fact regarding whether Guevara provided the information that led to the location and capture of Montesinos.

The other two pieces of evidence provided by Peru also fail to establish that Venezuela captured Montesinos without Guevara's assistance. Peru points to the Notice of Decision of the High Level Special Committee and to the Declaration of Ginocosta Santoalla ("Santoalla") as evidence that Montesinos was captured without Guevara's help. In his declaration, Santoalla merely concludes that Guevara misinterprets the terms of the Resolution and that, on the record of the Special Committee, the arrest by Venezuelan officials was an event independent of Guevara's conduct. Santoalla's declaration is conclusory. It does not state what evidence was before the Special Committee showing that Venezuela knew where Montesinos was located independent of Guevara. The Special Committee's Notice of Decision suffers from the same infirmity. The Notice merely states that "it was unanimously resolved to deny your request for financial compensation . . . inasmuch as the requirements set in said legal norm for granting the aforesaid compensation were not met." The Notice further states: "We emphasize that all the information related to the application of said Emergency Decree is secret, and those who violate this provision as provided in Article 6th of same, are subject to administrative, civil and/or criminal liability . . . ." Peru has

conveniently made the information related to the application of the decree secret so that no one could ever determine whether Guevara's information led to Montesinos's capture. Peru then states that Montesinos was captured by Venezuelan authorities and Guevara is supposed to take their statement at face value. In order to avoid summary judgment, however, Peru has to show that the Venezuelan authorities captured Montesinos without help from Guevara. As Peru has failed to do so, I am granting summary judgment in favor of Guevara on Counts I and II of the Complaint.

B. Awarding Guevara the Reward Does Not Violate Public Policy

The Eleventh Circuit has already considered the public policy issues in this case and has determined that, if Guevara is entitled to the reward, he should be paid. In *Guevara v. Republic of Peru*, 468 F.3d 1289, 1303-1304 (11th Cir. 2006), the Court stated:

> Anything that makes it easier for countries to welch on their promises to pay for information decreases the real value of any reward they offer and makes it less likely that an offer will be accepted. As Guevara has learned up to this point in the litigation, the promise of a multimillion dollar reward means little or nothing to an informant if the country offering the reward cannot be made to pay it. The holding Peru asks us to reach would jeopardize not only its vital interests but those of every country that offers rewards for information, including this country.

Peru knew, at the time of contracting, the source of Guevara's information. It should not now, after having received information regarding Montesinos, be allowed to use Guevara's association with Montesinos as a way to get out of paying the cost of its bargain with Guevara.

C. The Eleventh Circuit Has Already Determined My Jurisdiction in This Case

The Foreign Sovereign Immunities Act ("FSIA") provides the sole basis for obtaining subject matter jurisdiction over a foreign sovereign in the United States. *Guevara v. Republic of Peru*, 468 F.3d 1289, 1294 (11th Cir. 2006). I initially concluded that the FSIA barred Guevara's suit. The Eleventh Circuit explicitly disagreed with me, stating: ". . . we disagree with the district court that the FSIA bars Guevara's suit . . . ." *Id.* at 1305. Accordingly, my jurisdiction in this case has been established.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment as to Counts I and II of the Complaint [D.E. 119] is granted and the Peruvian Government's Cross Motion for Summary Judgment [D.E. 203] is denied.

DONE AND ORDERED in Miami, Florida, this 9th day of September 2008.

/s/ Marcia G. Cooke
MARCIA G. COOKE
United States District Judge

cc:

All counsel of record

APPENDIX C

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-16235

D. C. Docket No. 04-23223-CV-MGC

[Filed November 1, 2006]

JOSE GUEVARA,	)
	)
Plaintiff-Appellant,	)
	)
versus	)
	)
REPUBLIC OF PERU,	)
MINISTERIO DEL INTERIOR,	)
ANTONIO KETIN VIDAL,	)
FERNANDO ROSPIGLIOSI,	)
	)
Defendants-Appellees.	)
	)

Appeal from the United States District Court
for the Southern District of Florida

(November 1, 2006)

Before TJOFLAT, CARNES and HILL, Circuit Judges.

CARNES, Circuit Judge:

This appeal presents the issue of whether a foreign state's offer of a reward in return for information enabling it to locate and capture a fugitive falls within the Foreign Sovereign Immunities Act's commercial activity exception to sovereign immunity. For the reasons that follow, we conclude that it does.

I.

Vladimiro Lenin Montesinos Torres served as an advisor to Peruvian President Alberto Fujimori and as the head of Peru's National Intelligence System during the 1990s. (Compl. ¶ 8). He is currently in the midst of a series of corruption trials in that country. The allegations are that Montesinos committed a host of crimes while he was in office, including arms trafficking, drug dealing, money laundering, extortion, and more than a few murders. Id. According to declassified documents from the United States Southern Command, the nerve center responsible for this country's military operations in Latin America, Montesinos has "been compared variously to such sinister figures as Rasputin, Darth Vadar, Torquemada and Cardinal Richelieu." United States Southern Command, Information Paper (Jan. 6, 1997). The picture is one of a man who has never been troubled by anything resembling a moral scruple, and the facts about how he was brought to justice form the stage on which this lawsuit plays.

For decades journalists and politicians had been leveling accusations of corruption against Montesinos, but for a long time none of them stuck. Things began to change on the evening of September 14, 2000, when an opposition lawmaker aired on Peruvian national television a video showing Montesinos handing a bribe to a congressman-elect. See Clifford Krauss, Fujimori's Fall, N.Y. Times, Dec. 3, 2000, § 1, at 1.[1] That alone might not have done him in, but as it turned out Montesinos was like a serial killer who relishes the opportunity to relive his crimes—he had videotaped many of his dirty deeds. Id. Peruvian authorities seized from Montesinos more than 700 videotapes incriminating him in a host of crimes. See Jane Holligan, Bribes, Lies, and Videotape in Peru, Bus. Week Online, Feb. 2, 2001. On September 16, 2000, President Fujimori, facing public pressure, announced that he was dissolving the intelligence agency and that he would step down after holding new elections. See N.Y. Times, supra.

Jail time seemed imminent for Montesinos, but the former spy chief was also something of a magician. Over the years he had managed to make many of his enemies, including journalists, disappear, and he had one more magic act up his sleeve. Thomas Catan, The

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[1] Because this is an appeal from a Federal Rule of Civil Procedure 12(b)(1) dismissal, the operative facts are those alleged in the complaint. Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990). In this section of the opinion, where outside sources are cited, we have drawn some additional details from them to flesh out the story. Those details, which are entirely consistent with the complaint's allegations, are not essential to our decision. At least at this stage, the parties are at loggerheads over the law, not the facts.

Sins of Montesinos, The Fin. Times Mag., July 26, 2003, at 15. In October 2000, Montesinos slipped out of the country on a yacht bound for the Galapagos Islands, sailed on to Venezuela, and visited a plastic surgery clinic. Then he vanished. Id.

An international manhunt ensued. In November of 2000, Peru appointed a special prosecutor to investigate the intelligence system's net of corruption and to see that those involved were convicted and punished. (Compl. ¶ 11) The same month the prosecutor issued national and international arrest warrants for Montesinos. Id. Antonio Ketin Vidal, the Minister of the Interior of Peru, worked with international police agencies to coordinate the search. Id. Despite a media frenzy, the trail quickly grew cold. Fin. Times Mag., supra.

Peru needed to generate new leads. To do so, Interim President Valentin Corazao issued Emergency Decree No. 049-2001, which established a five million dollar reward for accurate information enabling the authorities to locate and capture Montesinos. (Compl. ¶ 12). Article One of that decree provided that Peru thereby:

> Establish[ed] a financial reward in the amount of US $5,000,000.00 (FIVE MILLION 00/100 UNITED STATES DOLLARS), which shall be given to the person or persons who provide(s) accurate information that will directly enable locating and capturing Vladimiro Lenin Montesinos Torres. In the event several persons provide the said information, the financial reward shall be divided among them.

(Compl. Ex. A). Article Three of the decree defined "accurate information":

> For purposes of this Emergency Decree, accurate information shall be that [information] provided through any means to the Special High Level Committee and which enables locating and capturing Vladimiro Lenin Montesinos Torres, who is wanted.

Id. (bracketed word in original)

Enter the plaintiff. Jose Guevara had met Montesinos in Venezuela in mid December 2000. (Compl. ¶ 15). Montesinos needed a safe-house, and Guevara agreed to provide it. Id. Guevara also provided Montesinos with a security detail, which gave him complete knowledge of the fugitive's whereabouts. (Compl. ¶¶ 15-16).

Guevara was easier to track down than Montesinos. In June 2001, F.B.I. agents located and detained Guevara in Miami. (Compl. ¶¶ 17-18). The agents told him that the United States intended to pursue criminal charges against him unless he gave up Montesinos. (Compl. ¶ 18). They also reminded Guevara of Peru's reward offer. Id. Faced with a choice of jail time and loyalty to Montesinos or five million dollars and freedom, it did not take Guevara long to make up his mind.[2] Guevara not only disclosed

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[2] The apparent ease with which Guevara made the choice to betray Montesinos brings to mind the epitaph an owner put on the tombstone of his departed canine companion: "[O]ne might have thought he was human, but he was loyal." Chiseled Farewells, Harv. Mag., Nov. – Dec. 2002, at 15 (quoting an epitaph on the

Montesinos' hiding place and telephone number but also arranged to have him delivered into the hands of the Venezuelan intelligence agency. (Compl. ¶ 22). Montesinos was arrested as a result of the information Guevara provided and the assistance he rendered, but for reasons that it has not disclosed in this case Peru has refused to pay him the promised reward. (Compl. ¶ 1).

II.

Guevara filed this lawsuit in the Eleventh Judicial Circuit of Florida, and it was removed under 28 U.S.C. § 1441(d) to the United States District Court for the Southern District of Florida. The lawsuit claims breach of contract, breach of contract implied in law, fraudulent inducement, and fraudulent misrepresentation. The named defendants include The Republic of Peru; its Ministry of the Interior; Antonio Ketin Vidal, who was the Minister of the Interior at the time of these events; and Fernando Rospigliosi, who succeeded Vidal in that office. The Republic of Peru and the Ministry of the Interior filed a motion to dismiss, contending that they are immune under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602–11. Vidal and Rospigliosi filed a motion to dismiss contending that as agents of the Republic of Peru they are likewise entitled to sovereign immunity. The two individual defendants also asserted that the district court lacked personal jurisdiction over them.

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tombstone of a dog named Pompey, buried in the animal cemetery in London's Hyde Park).

In an order entered on October 6, 2005, the district court concluded that Peru's actions did not fit under any exception to the FSIA and therefore both the nation and its Ministry of the Interior were entitled to sovereign immunity. On October 14, 2005, the court entered another order concluding that Peru's sovereign immunity protected the two individual defendants, who had been acting in their official capacity. On those bases, the court dismissed the complaint for lack of jurisdiction and denied all other pending motions as moot.

Guevara appealed the judgment dismissing his complaint. The individual defendants, in addition to urging that we affirm the dismissal on the grounds stated by the district court, have also pressed their position that the district court lacked personal jurisdiction over them.

III.

A.

The Foreign Sovereign Immunities Act provides the sole basis for obtaining subject matter jurisdiction over a foreign sovereign in the United States. Beg v. Islamic Republic of Pakistan, 353 F.3d 1323, 1324 (11th Cir. 2003). The Act provides a general grant of immunity for foreign governments, 28 U.S.C. § 1604, subject to specific statutory exceptions. The one at issue in this case is the commercial activity exception. 28 U.S.C. § 1605(a)(2). It provides that:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case– . . . (2) in which the

> action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Id.

Peru contends, and the district court agreed, that offering a reward for capturing a fugitive involves uniquely sovereign objectives, and for that reason does not constitute a commercial activity. Guevara responds that the dispositive issue is whether private actors could similarly offer a reward for information leading to the capture of a fugitive. They can, he says, and it follows that the activity is "commercial" as that term is used in the Act.

B.

To decide this issue we need to mark the boundaries of the "commercial activity" exception as it is used in the FSIA. Examining the text of the Act helps some. It says that "commercial activity" is:

> either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d). The Supreme Court has noted that this definition "leaves the critical term 'commercial' largely undefined." Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612, 112 S. Ct. 2160, 2165 (1992). The problem is that the first sentence "simply establishes that the commercial nature of an activity does not depend upon whether it is a single act or a regular course of conduct; and the second sentence merely specifies what element of the conduct determines commerciality." Id.

The Supreme Court, going beyond the statutory explanation, also determined in Weltover that the FSIA in general, and its commercial exception in particular, "largely codifies the so-called 'restrictive' theory of foreign sovereign immunity." Id. Under the restrictive theory immunity should be granted "only with respect to causes of action arising out of a foreign state's public or governmental actions." Alfred Dunhill v. Republic of Cuba, 425 U.S. 682, 698, 96 S. Ct. 1854, 1863 (1976). By contrast, sovereign immunity does not apply to a foreign state's "commercial and private activities." Id. To understand what this means we turn to an examination of the historical development of sovereign immunity law in this country, mindful of Holmes' advice that in order to know what the law is we must know what it has been and is becoming.[3]

The FSIA is only thirty years old, but the view of sovereign immunity that it embodies is much older.

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[3]See Oliver Wendell Holmes, Jr., The Common Law 1 (Boston, Little, Brown & Co. 1881) ("In order to know what it is, we must know what it has been, and what it tends to become. . . . The history of what the law has been is necessary to the knowledge of what the law is.").

Originally, the United States recognized only a limited form of sovereign immunity. David J. Bederman, Admiralty and the Eleventh Amendment, 72 Notre Dame L. Rev. 935, 939–40 (1997). More than two centuries ago a federal court applied an exception to foreign sovereign immunity where the foreign power's actions have a "commercial character." Ellison v. The Bellona, 8 F. Cas. 559, 559 (D.S.C. 1798). Early Supreme Court decisions similarly noted that "a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation." The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 143 (1812); see also The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 353 (1822).

This dichotomy between public and sovereign versus private and commercial fits the original figure Chief Justice Marshall used to explain the principle underlying the commercial exception to immunity—that of a sovereign "descending" to the level of a private individual. See Bank of the United States v. Planters' Bank of Ga., 22 U.S. (9 Wheat.) 904, 907 (1824) ("It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."). A state not acting in its unique role as sovereign is akin to a private citizen or merchant.

Although Schooner Exchange anticipated exceptions to immunity for private commercial activity, by the 1920s the decision had nonetheless "c[o]me to be regarded as extending virtually absolute immunity to foreign sovereigns." Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 486, 103 S. Ct. 1962, 1967 (1983); see, e. g., Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562, 571, 46 S. Ct. 611, 611 (1926). Over the next two decades, the Court shifted to a policy of deference toward the executive branch. See, e.g., Republic of Mexico v. Hoffman, 324 U.S. 30, 34, 65 S. Ct. 530, 532 (1945) ("Chief Justice Marshall introduced the practice, since followed in the federal courts, that their jurisdiction in rem . . . will be surrendered on recognition . . . of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs . . ."); Ex parte Republic of Peru, 318 U.S. 578, 588, 63 S. Ct. 793, 799 (1943) (same); Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68, 74, 58 S. Ct. 432, 434 (1938) (same). This deferential approach did not change the existing practice of granting sovereign immunity in virtually all cases where it was claimed, because the executive regularly requested that the courts grant immunity to all friendly foreign sovereigns. Verlinden, 461 U.S. at 486, 103 S. Ct. at 1968.

In 1952 the State Department changed the executive's policy to one embodying the restrictive theory of sovereign immunity. The department first signaled this shift in policy in a letter from Jack B. Tate, Acting Legal Adviser, United States Dept. of State, to Philip B. Perlman, Acting Attorney General. (May 19, 1952), as reprinted in 26 Dept. of State Bull. 984–85 (1952). Tate wrote in part:

> A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis). . . . it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

Id.; see also Alfred Dunhill, 425 U.S. at 698, 96 S. Ct. at 1863 (explaining that the position taken in the Tate Letter became the official policy of the United States government). This new restrictive approach also required the State Department to make case-specific immunity recommendations for each lawsuit against a foreign state, and that proved problematic. See Verlinden, 461 U.S. at 487, 103 S. Ct. at 1968. Congress resolved this problem, at least for the executive branch, by enacting the FSIA, shifting the burden of making immunity determinations to the judicial branch. 28 U.S.C. § 1602 (stating that the determination of immunity by the courts would "serve the interests of justice").

Although the FSIA transferred the job of making initial immunity determinations from the State Department to the United States courts, it retained

the restrictive theory of immunity. The House Report accompanying the bill that was ultimately enacted explained that:

> the bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis).

H.R. Rep. No. 94-1487, at 6 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605.

The case law governing foreign sovereign immunity and the legislative history of the FSIA both treat commercial and private activity as outside the bounds of sovereign immunity. See, e.g., Alfred Dunhill, 425 U.S. at 698, 96 S. Ct. at 1863 ("commercial and private activities . . . do not give rise to sovereign immunity"); The Schooner Exchange, 11 U.S. (7 Cranch) at 143 ("[A] clear distinction is to be drawn between . . . private individuals or private trading vessels, and . . . public armed ships."); H.R. Rep. No. 94-1487, at 6 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605 ("[T]he immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis)."). Commercial activities and private activities are often spoken of together and in a way that distinguishes them from sovereign or public acts. See, e.g., Weltover, 504 U.S. at 613, 112 S. Ct. at 2166 (noting "the distinction between state sovereign acts, on the one

hand, and state commercial and private acts, on the other"); Letter from Jack B. Tate, Acting Legal Adviser, Dept. of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), as reprinted in 26 Dept. of State Bull. 984–85 (1952) ("[t]he immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis)."); H.R. Rep. No. 94-1487, at 6 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605.

It is against this historical and legislative backdrop that the Weltover court announced the rule for determining whether an activity is commercial: "[W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." 504 U.S. at 614, 112 S. Ct. at 2166. The Court explained:

> [B]ecause the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," 28 U.S.C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in "trade and traffic or commerce," Black's Law Dictionary 270 (6th ed. 1990)

Id.

Our first extended discussion of the Weltover decision came in Honduras Aircraft Registry, Ltd. v. Gov't of Honduras, 129 F.3d 543 (11th Cir. 1997), where we stated that a "foreign state loses its immunity if it engages in commercial activity . . . because then it is exercising the same powers that a private citizen might be exercising." Id. at 548. We read Weltover to mean that "[a] foreign state is commercially engaged when it acts like an ordinary private person, not like a sovereign, in the market." Id.

The Honduras case involved a contract entered into by that country and the plaintiff, a corporation founded by two businessmen with airline experience, for the provision of goods and services Honduras needed to upgrade and modernize its civil aeronautics program. Id. at 545. The plaintiffs' responsibilities included establishing a database containing information that Honduras needed to admit airplanes to its registry. Id. When its leadership changed, Honduras abrogated the contract. After being haled into a United States court by the plaintiff, Honduras invoked sovereign immunity, arguing that the registration of aircraft is a sovereign act. Id. at 546.

While we agreed with Honduras that "registering aircraft under the Honduras flag is an act peculiar to its sovereignty," we nonetheless concluded that its contracting for services was a commercial act. Id. at 548. As we explained, "[a]pparently Honduras did not have the resources or the technical expertise to conduct its own aircraft inspections or to set up a registry," so it "ventured into the marketplace to find the expertise and resources needed to accomplish those tasks." Id. at 547. The plaintiffs did not contend that the contract gave them the right to register aircraft or

force Honduras to do so, but instead took the position that they had contracted to provide services in connection with registration and were bringing suit to enforce that contract. Id. at 548. We agreed, because "[a]ll of those underlying activities were commercial in nature and of the type negotiable among private parties." Id. at 547.

C.

The location and capture of a fugitive by law enforcement officials of a country may be a sovereign act, but that is not what this case is about. Peru's contractual offer of a reward did not promise that in return for the information it was seeking Peru would locate and capture Montesinos, and Guevara is not seeking to compel it to do so. All that Guevara is seeking is what Peru promised in the reward offer, which is that it would pay five million dollars to anyone who furnished information of the nature and quality that enabled Peru to capture Montesinos. The information that Guevara provided fit the requirements of the offer: it enabled Peru to capture Montesinos. The question in this appeal is whether Guevara can use the courts of this country to compel Peru to keep its contractual promise to pay him the money it offered.

The facts here are similar enough to those in the Honduras case to compel the same result. Just as Honduras could have attempted to develop its aircraft database in-house without offering money for the assistance of anyone outside the government, Peru could have attempted to use its police and investigatory powers to search for Montesinos without offering money for information from anyone outside

the government. However, Peru "did not have the resources or the . . . expertise," Honduras, 129 F.3d at 547, it needed to get the job done. After the trail ran cold, Peru "ventured into the marketplace," id., to buy the information needed to get its man. Id. Guevara provided that information for a price, the price being the five million dollars that Peru had offered to pay for it. The underlying activity at issue—the exchange of money for information—is "commercial in nature and of the type negotiable among private parties." Id.

Peru attempts to distinguish Honduras by arguing that here "[t]he sovereign act of capturing Montesinos [was] a condition precedent to the earning of the reward." (Br. Of Appellee at 8) On that basis it would have us conclude that the "sovereign act of capture was the 'nature' of the transaction." Id. at 7. Both the premise and the conclusion of Peru's argument are false.

The premise of the argument is false because the contract did not contain a condition precedent requiring Montesinos' capture. Article One of the emergency degree specifies that the reward "shall be given to the person or persons who provide(s) accurate information that will directly enable locating and capturing Vladimiro Lenin Montesinos Torres." (Compl. Ex. A) (emphasis added). Article Three specifies that accurate information shall be that "which enables locating and capturing Vladimiro Lenin Montesinos Torres." Id. (emphasis added) This condition describes the extent and quality of the information that an informant must provide to qualify for the reward. It does not require an actual capture. "Enable" means "to make able; give power, means, competence, or ability to; authorize" or "to make

possible or easy." Random House Unabridged Dictionary 639 (2d ed. 1983). Guevara satisfied the condition when he provided information sufficient to "make able" or "make possible" the capture of Montesinos. The information he provided enabled the capture when he provided it; it did not become enabling only after Peru took Montesinos into custody.

Although Peru issued the Emergency Decree in Spanish, we think that little has been lost in translation. Article One uses a conjugated form of the verb "permitir," which means "to permit" or "to allow." Harrap's Concise Spanish 383 (1991). Article Three uses "posibilitar," which means "to make possible" or "to facilitate." Id. at 397. Peru was not offering a reward in return for Montesinos' capture; it was offering a reward in return for information of sufficiently high quality to enable his capture. It is true that Article Seven provides that Peru "shall pay the Financial Reward 24 hours after the actual location and capture of . . . Montesinos." (Compl. Ex. A). While this clause could be read as a condition precedent requiring capture, it appears primarily intended to induce acceptance of the reward offer by promising timely payment.

Put another way, if Guevara had offered up every single bit of information Peru could possibly desire about how to locate and capture Montesinos, but Peru had a sudden change of heart and decided to let Montesinos remain free, we think that Guevara still would have satisfied his end of the bargain. Peru's own website describing the Emergency Decree best explains the document's terms: "The basic condition is to give true information to make possible the location and capture of Vladimiro Montesinos Torres." Id.

Guevara did that, and Peru used the information to capture Montesinos.

Even if the capture of Montesinos were a condition precedent, Peru's assertion that conditions necessarily (or even typically) alter the "nature" of a contract is mistaken. The core of a contract is the parties' performance obligations, what they bargained for. Conditions fix the timing of the parties' performance obligations or make them contingent. The occurrence of a condition may be beyond the parties' control, but that does not alter the nature of the contract. For example, an oil company might enter into a contract with a freight company to ship oil from Turkey to the United States conditioned on the oil company receiving an export license from the government of Turkey. Although the condition – the granting an export license – is a sovereign act, see MOL, Inc. v. Peoples Republic of Bangladesh, 736 F.2d 1326, 1328–29 (9th Cir. 1984), the contract is still one for the shipment of oil, which is quintessentially commercial.

The same principle applies if one of the parties is a sovereign state. Suppose that a country contracts to buy bullets from a private manufacturer. We know that transaction would be a commercial activity because the Supreme Court has said so. Weltover, 504 U.S. at 614, 112 S. Ct. at 2166 ("[A] contract to buy army boots or even bullets is a 'commercial' activity."). If the country conditioned the contract on it declaring war on a neighbor before the scheduled date of delivery, we would still have a commercial contract under which, if war is declared, the private party is obligated to supply bullets and the country would be obligated to pay for them. The condition precedent of a declaration of war speaks to the purpose or

motivation for buying the bullets, but it does not change the commercial nature of the acts of purchasing and paying for them. Enforcing the contract would not impinge on sovereignty, because it would not force the country to declare war or to refrain from doing so.

We think that information about a fugitive's whereabouts is to a war on crime as military supplies are to a more traditional war. Both commodities are useful to a state's performance of a sovereign function, but a contract for the purchase of either does not require the state to perform a sovereign function. In both situations performance of the contract by the private party enables the state to engage in a sovereign function if it wishes, but does not mandate that it do so. What it mandates is that the state pay the promised amount for the other party's performance. Paying an amount owed under a contract is not itself a sovereign act.

Conditions precedent stem from the motivation for a contract, rather than from its nature. Parties insert conditions precedent as insurance against frustration of purpose. If a general contractor only needs the services of a subcontractor if it wins the bid on a construction contract, it conditions the use of the subcontractor's services on the outcome of the bidding. Because Peru only wanted to pay for information about Montesinos sufficient to enable his capture, Peru framed its offer in those terms. Although capturing Montesinos may have been critically important to Peru and to its obligation under the contract, it is not critically important to our sovereign immunity analysis. The FSIA tells us that "[t]he commercial character of an activity shall be determined by

reference to the nature of the . . . act, rather than by reference to its purpose." 28 U.S.C. § 1603(d); see also Weltover, 504 U.S. at 614, 112 S. Ct. at 2166. If there is a condition precedent present here, it speaks to Peru's purpose, instead of to the nature of the contract.

Peru next contends that its offer of a reward cannot be "commercial" as that term is used in FSIA because there "is no marketplace in which private persons apprehend or capture individuals." (Br. Of Appellee at 9) In fact, there is. Not only that but the oldest American decision recognizing a commercial activities exception to sovereign immunity involved a reward for capture. In 1798 the District Court of South Carolina held that a ship flying under the flag of a foreign state could not claim sovereign immunity in a wage dispute where the wages it owed the seamen were paid as a reward for each ship captured, a fact that was "decisive of the commercial character" of the vessel. The Bellona, 8 F. Cas. at 559.

While the days of prize ships have passed, private individuals still can and do offer rewards for information leading to the capture of fugitives. For example, popular talk show host Oprah Winfrey recently offered up to $100,000 for information leading to the capture of fugitive child predators. See Oprah Winfrey Helps The FBI Get Its Man, Wash. Post, Oct. 8, 2005 at C7. Winfrey has already paid at least three such rewards. See Stella Foster, Stella's Column, Chi. Sun Times, Jan. 17, 2006, at 56. O.J. Simpson notoriously offered a reward for information leading to the arrest of his ex-wife's "real killers." See Paul Lieberman, Simpson Won't Get Police Help in Search for Killer, L.A. Times, Oct. 5, 1995, at A1. And, of course, private bail-bonding companies frequently offer

rewards for information leading to the capture of bail jumpers. The question is whether Peru's offer of a reward for information is the kind of thing that private parties do. The answer is that Oprah did it, O.J. did it, and bail bondsmen do it regularly.

Concerned about the effect of the bail bondsmen analogy on its position, Peru argues that "[w]hen a bailbondsman physically apprehends an individual, the bondsman does so as subrogee of the sovereign's authority." (Br. of Appellee at 11). Peru's point, apparently, is that when a bondsman arrests a fugitive he is acting as an agent of the sovereign. That argument does not help Peru much, if at all. If a bail bondsman offered a reward for information enabling the location and capture of a fugitive who had skipped out on a bond, he could not successfully defend a lawsuit seeking to collect on the reward by asserting sovereign immunity. If an agent acting for the sovereign could not successfully claim sovereign immunity, the sovereign could not either.

That Peru's offer of a reward for information enabling the capture of a fugitive is the kind of thing that private parties do becomes even more obvious when we properly characterize the market at a higher level of generality. In Weltover, the Supreme Court broadly characterized a contract for the purchase of bullets as a "sales contract[]." 504 U.S. at 614, 112 S. Ct. at 2166. In Honduras, we characterized the contract as one designed "to provide goods and services." 129 F.3d at 548. What we have here is a contract to purchase information, and in our information age such contracts are a common staple of the private sector. Peru's attempt to lower the level of generality from a contract for the sale of information

down to one of reward for information leading to the capture of a fugitive focuses on the purpose instead of the nature of the transaction.

Contracts for the purchase of information are ubiquitous in the marketplace. Marketing companies offer college students a few dollars, or a product worth that much, for completing surveys. Nonprofit groups pay market research firms for each name added to a targeted mailing list. Apartment complexes and fitness clubs offer referral bonuses for those who provide the names of friends and associates who may be looking for a place to live. A plethora of internet sites offer for sale information about the arrest record, litigation history, and location of everyone with a name and some kind of number to go with it. (Think LexisNexis.) Credit reporting agencies sell tens of millions of dollars of information about consumers and businesses to other businesses each year. There is nothing sovereign about buying and selling information.

Finally, Peru contends that even if a private individual can engage in an activity, it does not mean that the activity is commercial. It accuses Guevera of "equat[ing] private activity with commercial activity," (Br. of Appellee at 11), but this equation is hardly novel. Several centuries of case law, the Tate Letter, and the legislative history of the FSIA also use those terms interchangeably. Still, the term codified in the act is "commercial activity," and we agree with Peru that there is a realm of private activity that cannot fairly fall within any meaning of the word "commercial." But we do not agree with Peru's proposal about how we should stake off that realm.

Peru proposes that "commercial activity" includes only that which is "done for a profit motive." Id. at 12. We decline to adopt that test because the Supreme Court has instructed us that the FSIA "unmistakably commands" that we consider the nature, rather than the purpose, of a transaction, Weltover, 504 U.S. at 617, 112 Ct. at 2167, and a "motive" test treads too closely to an examination of "purpose."

Peru points out that while the text of the Act prohibits an inquiry into the government's actual motive for a particular act, it does not forbid us from imagining why a private person might engage in similar conduct. We could, Peru says, imagine that a hypothetical private party was performing an identical activity as the government and then inquire into whether that hypothetical party had a profit motive. We see no reason to do so, because this type of inquiry is not supported by the text of FSIA or by precedent. It would be inconsistent with the language of the Act and the Supreme Court's instruction that motive not be considered. It is also unnecessary, because the Weltover test already screens out non-commercial acts.

While the FSIA does not state that all commercial activities must have a profit motive, the legislative history of the Act does establish that all activities carried on for a profit are commercial. H.R. Rep. No. 94-1487, at 16 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6615. But saying that for-profit activities are commercial is not the same thing as saying that all commercial activities are for profit. The premise that all A is B does not logically compel the conclusion that all B is A, unless A and B are the same thing. There is no reason in the FSIA to believe that commercial activity means the same thing, and no more than,

for-profit activity. Some activities that are not carried on for a profit may nonetheless constitute commercial acts. As the House Report explains:

> Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act."

Id. Reducing the meaning of commercial activity to that motivated for profit excludes what the House Report referred to as "the other end of the spectrum," contracts "of the same character as a contract which might be made by a private person," even if not made for profit. Id.

Adopting Peru's position that an activity is not commercial unless it is for profit would also conflict with the Weltover decision. That decision establishes that a government contract to buy bullets is commercial, even though most private individuals do not buy bullets for profit. See 504 U.S. at 617. In fact, when private individuals purchase goods and services, they rarely do so with the intent to profit from their purchase. (Think of consumers at grocery stores and gas stations.) Peru's test would exclude most cases in which the government acts as a purchaser, rather than a vendor, of goods and services because most purchases made by private persons are not made with the intent to resell for profit. Nothing in the restrictive theory of sovereign immunity turns on whether the government is a buyer or a seller. Instead, the critical distinction is whether the government is acting in its

capacity as sovereign or if it is acting as any private individual might act.

We think that the Weltover test already provides an effective mechanism for filtering out private yet non-commercial activities. The test applies to suits "based upon a foreign state's participation in the marketplace in the manner of a private citizen." Weltover, 504 U.S. at 614, 112 S. Ct. at 2166 (emphasis added). It distinguishes between cases where a foreign government acts "as regulator of a market," which are not within the exception to sovereign immunity, and those where it acts "in the manner of a private player within" that market, which are. Id. When it issued the offer contained in the Emergency Decree, Peru entered the marketplace of information. It did so not as a regulator but as a purchaser in the manner available to any private individual, and that makes its actions commercial.

Although our decision is not based on policy grounds, we think it worth noting that this is an instance in which the result the law requires coincides with good policy. Accepting Peru's position, dressed though it is in the clothing of sovereignty, would frustrate rather than further the ability of countries to carry out their sovereign functions. Anything that makes it easier for countries to welch on their promises to pay for information decreases the real value of any reward they offer and makes it less likely that an offer will be accepted. As Guevara has learned up to this point in the litigation, the promise of a multimillion dollar reward means little or nothing to an informant if the country offering the reward cannot be made to pay it. The holding Peru asks us to reach would jeopardize not only its vital interests but those

of every country that offers rewards for information, including this country.

The United States has a number of statutes that authorize the executive branch to offer rewards for information useful in combating terrorism, espionage, international narcotics trafficking, violations of international humanitarian law, and other criminal acts. See, e.g., 18 U.S.C. §§ 3071–77 (authorizing the Attorney General to offer rewards for information leading to the arrest of individuals engaged in terrorism or espionage); 22 U.S.C. § 2708 (granting the Secretary of State discretion to pay rewards for information leading to the arrest of individuals engaged in international terrorism or narcotics-related offenses); Pub. L. No. 105-323, 112 Stat. 3029, 3032 (amending 22 U.S.C. § 2708 to extend it to cover serious violations of international humanitarian law relating to the former Yugoslavia); Pub. L. No. 106-277, 114 Stat. 813 (extending Pub. L. No. 105-323 to cover serious international humanitarian crimes in Rwanda); Pub. L. No. 108-106, 117 Stat. 1209, 1223 (authorizing rewards for information concerning an indictee of the Special Court for Sierra Leone). These reward programs have been successful. Under them the government has paid out at least $47 million since September 11, 2001. Kevin Whitelaw, Just a Phone Call Away, U.S. News & World Rep., Jan. 31, 2005, at 23. Success stories include the location and capture (killing) of Saddam Hussein's sons, Uday and Quasay Hussein, and the capture of Ramzi Yousef, one of the 1993 World Trade Center bombers. Id.

The FBI and CIA used a reward offer to nab one of the most nefarious spies in this country's history. For as long as three decades, a mole high in the American

intelligence community, code-named "Graysuit," passed on to the KGB some of this country's most closely held secrets. Louis J. Freeh, My FBI 237 (2005). A "huge team of CIA and FBI officers and agents" worked to uncover the traitor's identity but without success. Id. Finally, Louis Freeh, the Director of the FBI and George Tenet, the Director of Central Intelligence, came up with a plan to offer a "seven-figure payment" for his identity. Id. at 238. The reward offer was aimed at retired senior KGB intelligence officials. Id. One of them accepted the offer. Id. at 239. In return for "several million dollars plus other considerations" he turned over to the CIA and FBI a box full of files and information on Graysuit, which he somehow managed to smuggle out of Lubyanka, the infamous KGB headquarters. Id. With that critical information Graysuit was identified as a highly placed FBI agent named Bob Hanssen. Id. at 240. He was arrested, convicted, and sentenced to life imprisonment. Michael Killian, FBI Spy Hanssen Gets Life, Apologizes, Chi. Trib., May 12, 2002, at 1.

Had the KGB agent who accepted the reward offer in the Hanssen case had reason to doubt whether the United States would pay as promised, he would not have risked his life to provide the information that he did, information that was vital to this country's national security interests. The same is true of those who provided the information that enabled United States to corner Uday and Quasay Hussein and to capture Ramzi Yousef. None of the statutes that authorize the United States government to offer and pay rewards contains a waiver of sovereign immunity, but reward offers are only as effective as they are enforceable. Enforceable commitments are important to reward programs, which are in turn important to

the sovereign interests of this and other countries. Absent a clear requirement in the FSIA, we will not create impediments to the enforcement of reward contracts entered into by this or any other country.

IV.

Guevara contends that the district court erred in finding that Vidal and Rospigliosi, the individual defendants, acted within the scope of their authority as officials of Peru in offering the reward. The FSIA does not expressly provide immunity to individuals acting on behalf of a foreign state. Nonetheless, several circuits have found that such immunity extends to state officials acting in their official capacity. See, e.g., Velasco v. Gov't of Indonesia, 370 F.3d 392, 398 (4th Cir. 2004); Keller v. Cent. Bank of Nig., 277 F.3d 811, 815 (6th Cir. 2002); El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996); Chuidian v. Phil. Nat'l Bank, 912 F.2d 1095, 1103 (9th Cir. 1990). However this right is derivative; courts provide individual immunity because "[t]he rule that foreign states can be sued only pursuant to the specific provisions of sections 1605–07 would be vitiated if litigants could avoid immunity simply by recasting the form of their pleadings." Chuidian, 912 F.2d at 1102. That logic does not apply where the sovereign itself is not entitled to immunity. There is no present need to review the district court's conclusion that the individual defendants were acting within the scope of their authority. Even if they were, they are not entitled to sovereign immunity because the sovereign itself is not.

The individual defendants contend that we ought to affirm the judgment dismissing them from the lawsuit

anyway, on the ground that the district court lacked personal jurisdiction over them. The district court, having found that they were entitled to sovereign immunity, dismissed their challenge to personal jurisdiction as moot. That result followed from the district court's conclusion that the defendants were immune under the FSIA, which limits the subject matter jurisdiction of the federal courts. 28 U.S.C. § 1604 (stating that if the Act applies, "a foreign state shall be immune from the jurisdiction of the courts of the United States"). "[A] court should inquire into whether it has subject matter jurisdiction at the earliest possible stage in the proceedings." Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 410 (11th Cir. 1999). If the court finds that it does not have subject matter jurisdiction, "the court's sole remaining act is to dismiss the case for lack of jurisdiction." Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1261 (11th Cir. 2000).

Because we disagree with the district court that the FSIA bars Guevara's suit, the individual defendants' motion to dismiss for lack of personal jurisdiction is again relevant. However, the district court should have the first opportunity to resolve it. Defendants cite SEC v. Chenery Corp., 318 U.S. 80, 88, 63 S. Ct. 454, 459 (1943), for the proposition that we must affirm the decision of a district court if it reached the correct result but for the wrong reason. The Chenery case notes that this rule does not apply "where the correctness of the lower court's decision depends upon a determination of fact." Id. Our own decisions are to the same effect. See Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1372 n.5 (11th Cir. 1998) ("We are mindful of the general rule that a court of appeals will not consider issues not reached by the district court,

especially where the issues involve questions of fact."); Stewart v. Dep't of Health and Human Servs., 26 F.3d 115, 115–16 (11th Cir. 1994) (same). The "minimum contacts" prong of the personal jurisdiction inquiry is necessarily case and fact specific. We decline to take up that issue without the benefit of factfindings from the district court. Vidal and Rospigliosi may reassert on remand the issue of the district court's jurisdiction over their persons.

REVERSED and REMANDED.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 04-23223-Civ-COOKE/BANDSTRA

[Filed July 27, 2010]

JOSE GUEVARA,	)
	)
Plaintiff	)
	)
vs.	)
	)
REPUBLIC OF PERU, *et al.*,	)
	)
Defendants.	)
	)

ORDER DISMISSING CASE WITHOUT PREJUDICE

This matter is before me on remand from the Eleventh Circuit Court of Appeals. When this case initially came before me, I granted Peru's motion to dismiss, finding that the court lacked subject matter jurisdiction because Peru was immune from suit under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 ("FSIA"). [ECF No. 31]. Upon Guevara's appeal, the Eleventh Circuit held that the FSIA did not bar his lawsuit. My judgment was vacated and the case was remanded for further proceedings. On

remand, the parties engaged in discovery and Guevara filed a motion for summary judgment, which I granted. Peru appealed, reiterating its initial argument that the court lacked subject matter jurisdiction. The Eleventh Circuit agreed that Peru was not subject to this court's subject matter jurisdiction and remanded the case with the instruction that I dismiss the case, without prejudice. Accordingly, Plaintiff's Complaint is hereby **DISMISSED WITHOUT PREJUDICE**.

DONE AND ORDERED in Chambers, Miami, Florida this 27th day of July 2010.

/s/ Marcia G. Cooke
MARCIA G. COOKE
United States District Judge

cc:

The Honorable Ted E. Bandstra

All counsel of record

APPENDIX E

SECRETO

[seal] *U.S. Department of Justice*

Federal Bureau of Investigation

Office of the Legal Attache
United States Embassy
Lima, Peru

29 October 2001

His Excellence
Fernando Rospigliosi
Minister of Interior
Lima, Peru

Dear Minister,

Please allow me to express my sincere congratulations on your appointment as Minister. My colleagues in Miami and I enjoyed a fruitful working relationship with your predecessor, Antonio Ketin Vidal. We all look forward to continuing this cooperative relationship with you.

In response to your letter dated September 10, 2001, I would like briefly explain the FBI position regarding Mr. Jose Guevara. Working with our FBI

office in Miami, Mr. Guevara provided the key information that let to the location and capture of fugitive Vladimiro Montesinos. Most importantly, Mr. Guevara's decision to provide this information was influenced by the personal assurance of former Minister Vidal, communicated via the FBI, that the Government of Peru would favorably consider him for a significant portion of the $5 million reward offered for Montesinos' capture.

Naturally, the FBI will leave it to the government of Peru to assess the specific dollar value of Mr. Guevara's successful cooperation. Nonetheless, we respectfully request that this process be expedited as Mr. Guevara's health is poor and he is encumbered with many pressing financial obligations.

Sincerely,

/s/ Kevin W. Currier

Kevin W. Currier
Legal Attache

APPENDIX F

SECRETO

[seal] *U.S. Department of Justice*

Federal Bureau of Investigation

Office of the Legal Attache
Avenida Andrés Bello 2800
Santiago, Chile

30 October 2002

His Excellence
Gino Costa
Minister of Interior
Lima, Peru

Dear Minister,

In response to recent inquiries from your office with regard to the reward offered by the Government of Peru for the capture of Vladimiro Montesinos, I have attached a copy of the October 29, 2001, letter I forwarded to your predecessor, Fernando Respigliosi. This letter contains the FBI's official response relating to the reward. I am aware that in November 2001, you telephonically spoke with Miami FBI Special Agent Waldo Longo to discuss this matter in greater detail, as have others from your office as recent as September

2002. The enclosed letter and the comments made by Agent Longo reflect Mr Jose Guevara's key contributions which led to the location and capture of Montesinos.

Thank you again for your attention in this matter.

Sincerely,

/s/ Kevin W. Currier

Kevin W. Currier
Legal Attache

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IN THE

Supreme Court of the United States

JOSE GUEVARA,
Petitioner,

v.

REPUBLICA DEL PERU, AND
MINISTERIO DEL INTERIOR DEL PERU,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The petition does not raise an issue of law, but rather a dispute about the insufficiency of Plaintiff Jose Guevara's evidence. The Eleventh Circuit correctly found that Guevara's evidence failed to prove any "direct effect" in the United States from Peru's reward offer for accurate information directly enabling the capture of an infamous fugitive. Without a "direct effect" in the United States—*i.e.*, without any nexus between the conduct and the United States—the Eleventh Circuit dismissed the case for want of subject matter and personal jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(2). The Eleventh Circuit did not hold that the "direct effect" had to be a "legally significant act" or satisfy a requirement of "substantiality" or "foreseeability," as the petition suggests. These arguments were not made below and thus, not addressed by the Eleventh Circuit. Accordingly, they were not properly preserved for this Court.

Guevara's evidence of "direct effect" fails to raise any novel or highly disputed issues. He argues that his arrest in Miami was "in connection with" commercial activity of Peru; the Eleventh Circuit correctly held his arrest was in connection with his criminal activity. The Eleventh Circuit also correctly held that Peru's refusal to pay Guevara in the United States was not required by the reward offer, thus distinguishing this case from *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992). *See Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 75 (2d Cir. 2010) (no direct effect where payment in United States not contractually required).

The circuit split interpreting the FSIA's nexus requirement, that Guevara asserts, is illusory and immaterial to the outcome of this case. The three judges of the Eleventh Circuit, including the dissent, agreed that this case was not appropriate for a United States court to decide, as argued by the United States in its amicus brief to the Eleventh Circuit. And there are numerous additional bases to support the result.

The petition, thus, should be denied.

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MISCELLANEOUS

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IN THE
Supreme Court of the United States

No. 10-389

JOSE GUEVARA,
Petitioner,

v.

REPUBLICA DEL PERU, AND
MINISTERIO DEL INTERIOR DEL PERU,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This case has been before the United States Court of Appeals for the Eleventh Circuit twice. The Eleventh Circuit's first decision in this case held that "a foreign state's offer of a reward in return for information enabling it to locate and capture a fugitive" fell within the FSIA's commercial activity exception. 28 U.S.C. § 1605(a)(2). The decision, which reversed the district court's dismissal of Guevara's lawsuit, is reported at 468 F.3d 1289 (11th Cir. 2006) ("*Guevara I*").

On remand, the district court granted partial summary judgment in favor of Guevara and denied Peru's cross motion for summary judgment, finding Guevara had earned the reward and thus "effectively preempting the . . . evaluation decision" of the Peruvian governmental body (Special High Level Committee or "SHLC") that determined that Guevara had not earned the reward. 608 F.3d F.3d 1297, 1305. In response to Peru's argument that its conduct had insufficient nexus to the United States for jurisdiction under the FSIA, the district court held that the Eleventh Circuit already had decided the jurisdictional issues in *Guevara I*. The district court conducted no further analysis. This decision is published at 2008 WL 4194839.

The Eleventh Circuit's second decision reversed the district court, holding that: (1) it had not decided the nexus issue in *Guevara I*, and (2) the district court lacked subject matter jurisdiction because Peru's reward offer did not cause a direct effect in the United States under FSIA's commercial activity exception. That decision is reported at 608 F.3d 1297 ("*Guevara II*").

STATEMENT OF THE CASE

A. Factual Record

Plaintiff Jose Guevara, a former Venezuelan intelligence officer, provided security and a safe house in Venezuela for Vladimiro Montesinos, the fugitive head of Peru's National Intelligence Agency, who had purportedly committed a string of crimes, including arms and drug trafficking, money laundering, extortion, bribery, and multiple murders. 3a-5a of Guevara Appendix A (hereinafter cited as "Guevara App. A, __"). The first media leaks of Montesinos'

videotapes exposing some of his crimes led to the resignation of Peruvian President Alberto Fujimori, and created a political and constitutional crisis that had repercussions in Peru for many years. Guevara App. A, 3a. Montesinos quickly fled the country and disappeared.[1] Guevara App. A, 3a.

When the trail for Montesinos went cold, Peru's interim President Valentin Paniagua Corazao issued an Emergency Decree providing for a $5 million reward for "accurate information that will directly enable the locating and capturing" of Montesinos. Guevara App. A, 4a; Emergency Decree, Peru Appendix A (hereinafter referred to as "Peru App. A, __"). If more than one person supplied information, the reward would be split among them. The reward offer expressly required that information had to be provided to the SHLC, and that the SHLC would decide any reward claims. Guevara App. A, 4a. The decree authorized the government to take a loan from, and open an account in, a Peruvian state-owned bank to pay the reward. Guevara App. A, 4a. The decree gave the reward recipients no right to determine the place of payment.

While harboring Montesinos, Guevara and others extracted at least $55 million from him as protection money. DE 296-3, pp. 41589-92; DE 295-3, pp. 4544-45; DE 295-2; p. 45,757; DE 296-6, pp. 68890, 68900.[2] When Montesinos was running out of money,

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[1] The Eleventh Circuit recounted the facts in the light most favorable to Guevara. We include a more complete recitation of the record before the district court.

[2] DE refers to the docket entry number on the docket in the U.S. District Court for the Southern District of Florida, Case No. 1:04-cv-23223-MGC.

Guevara made trips on Montesinos' behalf to Lima, Bogotá, Miami and Nassau, Bahamas seeking additional funds. DE 201-2, pp. 35, 36, 94. On June 22, 2000, Guevara was arrested in Miami by the FBI after attempting to extort a banker to release a total of $3.7 million from one of Montesinos' bank accounts. Guevara App. A, 10a. Guevara was charged with extortion and fraud against the United States. 18 U.S.C. §§ 875(b), 371. DE 201-2, p. 108; DE 201-6.

While in FBI custody, Guevara was told that he would be released and the charges dropped if he cooperated in Montesinos' capture. He also was informed of Peru's reward offer, which the FBI was aware of from published reports. Guevara App. A, 5a-6a. Supervisory Special Agent Kevin Currier testified that Guevara had agreed to cooperate with the FBI before he was informed of Peru's reward. DE 319-3, pp. 39-42. Currier, who was stationed in Lima, consulted with Minister of the Interior Antonio Ketín Vidal and worked out a plan for Montesinos' capture. DE 201-3, p. 125. In a single telephone conversation from Lima, Vidal and Currier told FBI Agent Waldo Longa in Miami to instruct Guevara to have his accomplices in Caracas deliver Montesinos to the Peruvian ambassador's residence. Guevara App. A, 12a-13a. Vidal also explained the terms of the reward to Longa who passed the information to Guevara. Guevara App. A, 13. Guevara then called his accomplice in Venezuela and supposedly gave the instructions. Guevara App. A, 13a.

Montesinos never arrived at the Peruvian ambassador's residence; he was captured that same night by the Venezuelan authorities. Guevara App. A, 13a. The next day Venezuelan President Hugo Chavez

announced that Venezuela had found and arrested Montesinos. DE 201-3, pp. 55, 68; DE 201-4, p. 58. In a diplomatic flap with both Peru and the United States, Venezuela said it alone had located Montesinos.[3] The head of the FBI's Miami field office stated publicly he did not know how Montesinos was arrested, and Guevara told the media that the Venezuelan government had known all along where Montesinos was hiding. DE 285-14, DE 265-1, DE 201-2, pp. 69-73.

Guevara then submitted a claim for the reward to the SHLC, which conducted an extensive investigation, including meetings and correspondence with FBI Agent Currier and Guevara's lawyer. DE 326-5, ¶ 5. Despite repeated requests over a two-year period, Currier could not connect Montesinos' arrest to Guevara's purported cooperation. DE 326-5, ¶¶ 6, 7, 14. Guevara, who was in the best position to provide evidence regarding the circumstances of the arrest, relied only on the coincidence of timing between his call to Caracas and Montesinos' subsequent arrest. The SHLC, therefore, concluded that the Venezuelan Government's intervention was an independent event that resulted in Montesinos' arrest, and denied Guevara's claim. DE 326-5, ¶¶ 16, 19; DE 201-4, pp. 20-21.

B. Proceedings Below

Guevara filed suit against Peru and two ministers seeking the reward in Florida state court. Guevara App. A, 6a. After removing the case to federal court, Peru moved to dismiss on the grounds of sovereign

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[3] Venezuela's tension with Peru and the United States is reported in a June 29, 2001 Associated Press Worldstream article. DE 285-14.

immunity. Guevara App. A, 6a-7a. Peru argued that a reward offer did not constitute "commercial activity" that had sufficient "nexus" to the United States under the FSIA. DE 17, ¶¶ 10, 11. The district court dismissed, ruling that a reward offer was not commercial activity. Guevara App. A, 17a. The court did not address Peru's nexus argument. DE 31.

The Eleventh Circuit reversed in *Guevara I*, holding that the reward offer was commercial activity. Guevara App. C. Because it was not a basis for the district court ruling, the nexus issue was not presented to the Eleventh Circuit, and the court's opinion did not address the issue. Guevara App. A, 17a.

On remand, Peru preserved the nexus issue in its answer. In the midst of discovery, Guevara moved for partial summary judgment, and Peru responded, in part, by again arguing the nexus issue. DE 200, pp. 17-18. The district court granted Guevara partial summary judgment on his breach of contract claim, finding that Guevara had earned the reward. The court relied principally on its interpretation of a preliminary SHLC resolution that purportedly acknowledged Guevara's role in Montesinos' arrest. Guevara App. A, 14a. This interpretation was contested by an affidavit from the SHLC Chairman, and on reconsideration, by three additional affidavits, including by the draftsman of the resolution. DE 201-8, ¶ 3; 285-15, ¶¶ 12-13; 285-20, ¶¶ 4-5; and 285-21, ¶¶ 3-5. The district court also relied upon a conclusory, hearsay affidavit by FBI Agent Currier stating that Guevara's cooperation "indirectly" resulted in Montesinos' arrest, which fails on its face to satisfy the causation requirement in the reward decree ("directly enabling"). Guevara App. B, 40a-

41a; DE 119-3, ¶ 16. Currier acknowledged in his deposition that he had no personal knowledge regarding the circumstances of Montesinos' capture.

In opposing Guevara's motion to compel Agents Longa and Currier to testify at trial, the FBI disavowed Currier's affidavit, saying it was unauthorized and did not reflect the position of the FBI. Peru App. B, p. 16a, n.2.

On reconsideration, Peru submitted two sworn affidavits from the Venezuelan Congressional record by Guevara's accomplice, stating that Guevara had secretly signaled him on the telephone call from FBI custody to murder Montesinos. DE 297-6, p. 43, DE 326-3, pp. 4546-47, 4549-50. Guevara did not dispute these statements, in an affidavit or otherwise, and they stand uncontested on this record. DE 319-1, pp. 16, 17. Guevara's assertion that he had cooperated with the FBI to bring about Montesinos' capture thus evaporated, along with any possible dispute regarding his ineligibility for the reward.

On the nexus issue, the district court found that the issue had already been decided by the Eleventh Circuit in *Guevara I*, and said no more. Guevara App. A, 13a. After the district court denied reconsideration, Peru appealed. DE 284, 344, 349.

Guevara did not address the nexus issue in his briefing before the Eleventh Circuit, aside from asserting that the Eleventh Circuit already had determined the issue in the previous appeal. At oral argument, the Eleventh Circuit offered Guevara the opportunity to identify a nexus between Peru's commercial activity and the United States.

After oral argument, the United States submitted an amicus brief urging reversal of the district court,

which the Eleventh Circuit accepted. Brief for the United States as Amicus Curiae in Support of Republica Del Peru, Peru App. C. The United States said:

> To protect the prerogatives of the Executive Branch in its conduct of foreign affairs, both the act of state doctrine and principles of international comity generally preclude U.S. courts from reviewing and overriding the sovereign decisions of foreign states and foreign tribunals. Particularly because this judgment against Peru presents two serious foreign-relations dilemmas for the United States, the doctrines are fully applicable here.

Peru App. A, pp. 35a-36a.

In reversing the district court, the Eleventh Circuit found that it had not previously decided the nexus issue, which had been properly preserved by Peru. Guevara App. A, 15a. On this issue, Judge Cox dissented but suggested, nonetheless, the case might not be appropriate for resolution by a United States Court under the doctrine of international comity. Guevara App. A, 32a.

On the merits of the nexus issue, the Eleventh Circuit responded to Guevara's nexus argument by finding that Guevara's arrest in Miami was in connection with his own criminal—not Peru's commercial—activity. Guevara App. A, 25a-26a. Peru's alleged refusal to make payment in the United States fails as a direct effect because Guevara had no right to payment in the United States; the Emergency Decree established a loan and bank account in Peru for payment. Guevara Appendix A, 4a. The Eleventh Circuit also found that Peru's refusal to pay the

reward to Guevara was a "negative activity" that alone did not satisfy the commercial activity exception. Guevara App. A, 25a.

The Eleventh Circuit held that the "one-off" telephone conversation among the two FBI agents and the Peruvian Minister did not constitute an act in connection with commercial activity. Guevara App. A, 25a. (During oral argument Guevara appeared to abandon, as evidence of direct effect, that single telephone call. *Id.*) The Eleventh Circuit found this call to be an insufficient basis to exercise personal and subject matter jurisdiction over a foreign state by analogy to the minimum contacts test for Due Process. Guevara App. A, 25a.

SUMMARY OF ARGUMENT

Guevara's petition founders on two misconceptions: (1) he misstates the Eleventh Circuit's holding in order to argue that a purported circuit split on the "direct effects" rule under the FSIA is relevant and case dispositive; and (2) he also misstates the record in arguing that the FBI and State Department differ on the handling of this case.

Peru's reward offer had no effect—legally significant or otherwise—in the United States; the Emergency Decree required all material events to occur in Peru, and Guevara's claims of a direct effect are factually inaccurate and legally deficient by any precedent. Guevara's case was properly dismissed for lack of subject matter jurisdiction, and even if subject matter jurisdiction were present, his case would be dismissed on principles of international comity (as even the dissent in the Eleventh Circuit suggested) and act of state, as well as numerous other grounds

including the merits (Guevara did not earn the reward).

Public policy also supported dismissal. As set forth in the United States' amicus curiae brief, assuming jurisdiction over a foreign reward program would violate principles of international comity, create serious diplomatic tensions, and necessarily result in United States law enforcement and diplomatic decisions regarding our own reward programs being subjected to review by foreign courts. The United States stated:

> [T]he federal government has a profound interest in preventing the district court's judgment from undermining our nation's relationship with a stable democratic partner in South America. Moreover, the United States operates its own highly successful international reward programs, and the judgment here raises the troubling specter of foreign courts overriding decisions made by U.S. law enforcement and diplomatic officials.

Peru App. C, 28a. The United States has at least 15 statutory reward programs, and frequently denies reward claims. 67 Am. Jur. 2d Rewards § 5. As the United States recognized, any interference by the United States in Peru's sovereign decisions regarding a notorious former government official would stress an otherwise friendly relationship. The United States, therefore, urged the Eleventh Circuit to dismiss Guevara's case on the alternative grounds of international comity and act of state.

The question presented, as framed by Guevara, did not and could not have determined the result of this case. The single phone call, and Peru's "negative

activity" in failing to pay the reward, had no direct effect in the United States, regardless of whether those actions or non-actions are characterized as "legally significant acts." The Eleventh Circuit's ruling was correct, and numerous other grounds support dismissal. The petition should be denied.

ARGUMENT

Even if properly preserved for this Court—which it was not— Guevara's arguments do not raise the issue of whether a "legally significant act" must occur in the United States, as the petition argues.[4] Guevara did not raise the issue below, the Eleventh Circuit did not address the issue, and none of Guevara's arguments for direct effect turn on the outcome of this issue. Under any existing interpretation of the direct effect clause, Peru's conduct did not waive sovereign immunity under the FSIA.

The Eleventh Circuit held that the evidence did not establish that Peru's activities fell within any of the three clauses of FSIA's commercial activity exception, including the direct effect clause. Guevara App. A, 20a-26a. In his petition, Guevara concedes the first two clauses do not apply and challenges only the

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[4] Guevara incorrectly asserts that this issue was raised below and addressed by the Eleventh Circuit two times. Petition for Writ of Certiorari, (hereinafter cited as "Pet. _"), pp. 10-11. Neither opinion addressed whether a "legally significant act" must occur within the United States under the commercial activity exception. The Eleventh Circuit's first opinion addressed whether the offer of a reward was commercial activity. *Id.* at 48a. The second opinion addressed whether Peru's acts fell within any of § 1605(a)(2)'s three clauses. *Id.* at 20a-26a. Guevara did not raise below and the courts did not address whether a "legally significant act" must occur in the United States.

Eleventh Circuit's determination that the third clause—or "direct effect" clause—does not establish an exception to immunity for Peru. The clause provides an exception to immunity when:

> . . . the action is based . . . [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

§ 1605(a)(2). Guevara argues that the Court should grant his Petition so that the Court can resolve a purported circuit split on "whether the commercial activity exception's 'direct effect' clause requires evidence that a 'legally significant act' occurred within the United States in the order to vest American courts with jurisdiction over a foreign sovereign." Pet., i-ii, Question Presented.

This case is not appropriate for resolving those issues. Guevara did not raise in the courts below the issue of whether Peru's purported actions involving the United States were or were not "legally significant," or whether any circuit split on that question existed. Rather, he merely asserted that the Eleventh Circuit already had decided the issue of the court's subject matter jurisdiction in its 2006 *Guevara I* opinion. The Eleventh Circuit did not require Guevara to plead or prove the existence of a "legally significant act." Indeed, the Eleventh Circuit did not address the "legally significant act" issue in *Guevara II* at all—understandably so, because Guevara did not raise it. As this issue has not been preserved, the Court should deny Guevara's petition on this ground alone.

As support for his argument that the Eleventh Circuit applied the "legally significant act" test, Guevara states that the question the court defined was whether "the effect was sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case." Pet. 14 (citing Guevara App. A, 23a-24a). This language clearly shows that the Eleventh Circuit was concerned about whether the *effect* was sufficiently in the United States, not whether the *conduct or act* was sufficiently in the United States. In determining whether Peru fell within the "direct effect" clause of the commercial activity exception, the Eleventh Circuit correctly held that "[n]either of Guevara's arguments for a direct effect in the United States reflects [*Republic of Argentina v.*] *Weltover* [504 U.S. 607 (1992)]'s requirement of immediate consequences or *Harris Corp. [v. Nat'l Iranian Radio & Television*, 691 F.2d 1344 (11th Cir. 1982)]'s focus on significant financial consequences in the United States. Therefore, we cannot conclude that a direct effect occurred in the United States as a result of Peru's promise to pay the reward money." Guevara App. A, 26a.

The Eleventh Circuit thus was not called on to assess the nature or quality of Peru's alleged acts—"legally significant" or not—because no act was alleged or proven that could possibly have had a direct effect in the United States. Equally to the point, the Eleventh Circuit did not require that Guevara prove a "legally significant act," either in the United States or outside it. Because Guevara did not have to meet any such legal standard, that test had no significance to the outcome of this case.

Guevara's petition consists mostly of an academic discussion of the "legally significant act" test in the

courts; the petition barely attempts to identify Peru's acts that supposedly waived its sovereign immunity under the FSIA. Guevara argues that the reward "offer itself constituted commercial activity." Pet. 17-18. Guevara maintains that he accepted Peru's offer by performing in the United States, "*i.e.*, he provided information and coordinated efforts from the United States which led to the location and capture of the fugitive Montesinos[,]" which presumably provided the "direct effect" on the United States under the third branch of § 1605(a)(2). Pet. 18. The record does not support his argument, and Peru's reward offer defined acceptance as the delivery of information to the SHLC *in Peru*.

Guevara's arrest was not commercial activity carried on by Peru, in the United States or in Peru. As the Eleventh Circuit properly held, Guevara's arrest and subsequent cooperation was in connection with Guevara's criminal activity, not the reward. Guevara App. A, 25a-26a ("Guevara's arrest was 'an immediate consequence' of his criminal activity, not of Peru's offer of a reward for Montesinos's capture" (quoting *Weltover*, 504 U.S. at 618). Law enforcement activities do not fall within the commercial activity exception. *Saudi Arabia v. Nelson*, 507 U.S. 349, 362 (1993) ("Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce."). Guevara's call to Caracas was not a condition of the reward; it was law enforcement activity which cannot provide the basis for jurisdiction under the commercial activity exception.

The factual record also defeats Guevara's argument. Guevara was required to make the call to Venezuela for the much more immediate purpose of

obtaining his "get out of jail free card" from the FBI. DE 319-3, pp. 39-42. Guevara submitted no evidence suggesting he was motivated to make the Venezuela call to earn the reward; according to FBI Agent Currier, Guevara had agreed to cooperate with the FBI before he knew about Peru's reward offer. DE 319-3, pp. 39-42; DE 119-3, ¶ 8. Even assuming that his purported cooperation would satisfy the reward offer, the uncontested evidence is that Guevara was only feigning cooperation while ordering Montesinos's murder from FBI custody. DE 297-6, p. 43, DE 319-1, pp. 16, 17, DE 326-3, pp. 4546-47, 4549-50. In addition, Guevara presented no evidence that his telephone call to Caracas was related to Montesinos's capture, except as a *post hoc, ergo procter hoc* coincidence of time. He even admitted that the Venezuelan government did not need his information; they knew where Montesinos was from the outset. DE 285-14; DE 201-2, pp. 69-73.

Nor could the reward offer itself have a direct effect in the United States. Reciting the facts in the light most favorable to Guevara, the Eleventh Circuit confronted a record in which the Emergency Decree defined the operative performance as the receipt of information by the SHLC *in Peru* (which never occurred); Guevara made a claim to the SHLC *in Peru*; his counsel met with members of the SHLC *in Peru*; the alleged breach of contract occurred when the SHLC, after an extensive and good faith review, denied Guevara's claim *in Peru*; and Peru declined to make payment from a bank account authorized by the Emergency Decree to be opened *in Peru*. Guevara App. A, 20a; Peru App. A, pp. 1a-6a. Guevara argued that even though every event in connection with the offer took place in Peru, a direct effect sprang from what the Eleventh Circuit de-

scribed as "Peru's failure to make the reward payment within the United States—a sort of 'negative activity[.]'" Guevara App. A, 25a. The Eleventh Circuit observed that no federal court had ever relied on such "negative activity" to confer subject matter jurisdiction under § 1605(a)(2), and correctly rejected Guevara's argument. *See also Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 76 (2nd Cir. 2010) (under FSIA, "although the failure to act may have a legally significant effect in the place where the act was to have been performed, the failure to act is not itself an act.").

Guevara's argument that he was entitled to payment in Miami fails because it is factually inaccurate, as the Eleventh Circuit found. Guevara App. A, 23a. The Emergency Decree authorized a loan and bank account in Peru for payment of the reward. *Id.* The decree requires the loan to be taken from Banco de la Nación, a state-owned bank, and describes it as an internal indebtedness operation. Nothing in the decree requires payment in the United States, or gives Guevara the power to choose the place of payment. Thus, Guevara's case is distinguished from *Weltover*, 504 U.S. at 619 (direct effect because payment due in the United States) and *Hanil Bank* v. *PT. Bank Negara Indonesia*, 148 F.3d 127, 132 (2d Cir. 1998) (direct effect when plaintiff entitled under a letter of credit to designate place of payment and it designated its New York bank account), and similar to the Second Circuit's recent decision in *Guirlando.*

Guevara argued (but abandoned) the proposition that a direct effect in the United States occurred by virtue of the single Lima-Miami telephone call in which Minister Vidal conveyed the terms of the offer to FBI Agent Longa. The Eleventh Circuit held that

Guevara's acceptance-related activity involved only this "one-off" telephone communication that was too *de minimis* to support subject matter jurisdiction, using the minimum contacts personal jurisdiction test as an analogy, as this Court did in *Weltover,* 504 U.S. at 619. Guevara App. A, 25a. The Vidal call also was in connection with law enforcement—not commercial—activities. *Id.* The participants were discussing how to bring about Montesinos' arrest, and Minister Vidal did nothing more than repeat the terms of the reward offer.

In short, the Eleventh Circuit correctly determined that no act performed by any character in this drama brought about a "direct effect" in the United States within the meaning of § 1605(a)(2) of the FSIA. This conclusion did not turn on whether any act was "legally significant," because no act, regardless of how it could be characterized, produced the requisite direct effect in the United States. No party, including Guevara, raised this issue, and the Eleventh Circuit had no occasion to consider it.

Even though the "legally significant act" test is irrelevant to the outcome of this case, Guevara evidently believes that a circuit conflict is a potential ticket to review by this Court. He therefore raises this issue for the first time in his petition, and devotes the lion's share of the petition to explication of a purported circuit conflict on this irrelevant issue.

Guevara argues that some circuits require a "legally significant act" in the United States under the direct effect clause, while others do not. He asserts that the Eleventh Circuit requires a legally significant act to occur within the United States.

Contrary to Guevara's assertions, the Eleventh Circuit does not require a legally significant act, neither within nor without the United States. In this case, the Eleventh Circuit explicitly followed this Court's articulation of the nexus rule in *Weltover*, 504 U.S. at 618, where the Court held that "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity." (ellipses in original). Guevara App. A, 23a. The Eleventh Circuit did not mention the legally significant act test at all, let alone the location of any such act, nor did it include or make reference to a "substantiality" or "foreseeability" requirement, which *Weltover* expressly rejected.

Here, the Eleventh Circuit adopted the sensible approach recently exemplified by the Sixth Circuit in *American Telecom Co., LLC v. Republic of Lebanon*, 501 F.3d 534 (6th Cir. 2007). Noting that some circuits adopt the legally significant act formulation, others reject it, and still others find it "helpful but not required," the Sixth Circuit said: "But, while the circuits have framed the inquiry differently, these differences have no impact here. The present case is easily resolved without resort to any legally significant act . . . ." *Id.* at 540. Like the Eleventh Circuit here, the Sixth Circuit found that the conduct alleged simply could not have had a direct effect in the United States, and dismissed the case for want of subject matter jurisdiction under the FSIA.

Notably, although the Sixth Circuit in *American Telecom* catalogued the circuits with regard to their positions on the "legally significant act" issue, it did not identify the Eleventh Circuit as yet having taken any position on the question. That agnosticism remains unchanged after the Eleventh Circuit's deci-

sion here. Even if there is a circuit conflict on this issue, the Eleventh Circuit's non-position is not in conflict with any other circuit, making this case a particularly unsuitable vehicle for resolving whatever conflict may exist.

Guevara also relies on public policy arguments, none of which are valid.

First, Guevara maintains that because the United States—like Peru—offers rewards as adjuncts to law enforcement, United States courts should compel Peru to pay him the award he contends that he has earned. Pet. 18-19. To the contrary, the SHLC, a duly constituted organ of the Peruvian government, following in good faith the procedures set out in the reward offer, and with the participation of the FBI and Guevara's attorney in the process, determined that Guevara had not earned the reward. As the United States explained in its amicus brief to the Eleventh Circuit, and as Judge Cox noted in his dissent, the courts of the United States would violate basic principles of comity if they sat in judgment on the acts of other sovereign nations in determining entitlement to reward offers. Indeed, public policy dictates precisely the opposite conclusion from that urged by Guevara. As the United States also explained in its amicus brief, if a United States court can "effectively preempt[] the . . . evaluation decision" of the Peruvian government (*Guevara II*, 608 F.3d at 1305), courts of other nations would be encouraged to "preempt the . . . evaluation decision[s]" of the United States, and order payment of rewards to claimants that the United States had determined to be unjustified.

In fact, when Guevara accepted the reward offer, he also accepted the stipulation that his entitlement

to the reward would be decided by the SHLC in Peru. Guevara is no different from a party who signs a garden-variety contract that contains a forum selection clause dictating how and where disputes under the contract will be resolved. Guevara, having accepted and participated in that process, cannot now ask a U.S. court to supplant the Peruvian tribunal whose decision Guevara agreed to respect.

Second, Guevara reverses course and argues that a reward offer is not "typical" commercial activity, and should be evaluated under some unspecified new FSIA standard "requir[ing] closer scrutiny." Pet. 21. ("This is not a typical fact pattern; this case does not involve the type of commercial activity regularly considered by the courts in determining whether an exception to the FSIA's presumed immunity applies."). Guevara cannot have it both ways: having persuaded the Eleventh Circuit in *Guevara I* that a reward offer is commercial activity potentially subject to FSIA jurisdiction, Guevara cannot in good conscience maintain in this Court that a reward offer is in some way less commercial than the activities that ordinarily fall within the exception. Indeed, if Guevara had made this concession to the Eleventh Circuit in *Guevara I*—that a reward offer is not "typical" commercial activity—this case would have been over in 2006.

Third and finally, Guevara argues that FBI Agent Currier's urging to the Peruvian government to pay the reward to Guevara exposes a "yawning conceptual gap" between the FBI and the position taken by the United States in its *amicus* brief to the Eleventh Circuit. Pet. 22. That "gap" is illusory. The FBI later disavowed Currier's statements as unauthorized. Even if the FBI had not disavowed

them, Agent Currier's letters do not contradict the considered position taken by the United States in this litigation with regard to the application of the doctrine of international comity. Agent Currier did not and could not take a legal position on this issue on behalf of the FBI.

CONCLUSION

There is no law, no equity and no public policy that would justify the district court assuming jurisdiction over Guevara's reward claim and entering judgment for Guevara. Guevara invites this Court to second-guess the decision of an organ of the Peruvian government, which is an inappropriate undertaking for a United States court. His petition should be denied.

Respectfully submitted,

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October 22, 2010

Counsel for Respondents

APPENDIX

APPENDIX A

STATUTE LAWS

YEAR XIX - No. 7608

EMERGENCY DECREES

EMERGENCY DECREE NO. 049-2001

ESTABLISHING A FINANCIAL REWARD IN EXCHANGE FOR ACCURATE INFORMATION LEADING TO THE LOCATION AND CAPTURE OF VLADIMIRO MONTESINOS TORRES

THE PRESIDENT OF THE REPUBLIC

WHEREAS:

The authorities of the Peruvian Judiciary, the Office of the Prosecutor General and the National Police are concentrating working on prosecuting several criminal acts committed by various officials between 1990 and 2000;

Vladimiro Montesinos Torres stands out among said officials, who, during the aforementioned period held the position of Advisor in the National Intelligence System.

The aforesaid person was involved in serious crimes which affect the security of the State and society overall, in accordance with the evidence which has been obtained in special proceedings and judicial inquiries which are being conducted pursuant to Laws Nos. 27378, 27379 and 27380 on organized crime;

Therefore, a warrant for his arrest has been issued by several Courts as the alleged perpetrator of crimes against government administration, public corruption, embezzlement, crimes against persons, aggravated murder, drug trafficking, national security and others;

There is a need to adopt exceptional economic and financial measures to grant a financial reward to the person or persons who provide(s) accurate information which will enable locating and capturing Vladimiro Lenin Montesinos Torres, in accordance with the procedure set forth in this Emergency Decree;

Said measures will contribute to deciding the criminal acts under investigation, by virtue whereof there are matters of national security which justify its immediate issuance;

Exercising the authority vested under Article 118 paragraph 19) of the Peruvian Political Constitution: As approved by the Cabinet by way of a vote; and required to report to the Congress of the Republic;

DECREES:

Article 1-Financial Reward

Establish a financial reward in the amount US $5,000,000.00 (FIVE MILLION 00/100 UNITED STATES DOLLARS), which shall be given to the person or persons who provide(s) accurate information that will directly enable locating and capturing Vladimiro Lenin Montesinos Torres. In the event several persons provide the said information, the financial reward shall be divided among them.

Article 2-Special High Level Committee

Establish a Special High Level Committee in the Ministry of the Interior *[Department of Homeland Security]* for the purpose of evaluating information received and deciding on granting the financial reward. The Special High Level Committee shall consist of:

— the Secretary of Homeland Security, who will preside
— the Undersecretary of Homeland Security
— the Director General of the National Police

— the Director General of Intelligence of the Department of Homeland Security

Article 3- Accurate Information

For purposes of this Emergency Decree, accurate information shall be that [information] provided through any means to the Special High Level Committee and which enables locating and capturing Vladimiro Lenin Montesinos Torres, who is wanted.

Article 4-Use of a Pseudonym

The informant or informants may use a pseudonym, in which case the Special High Level Committee shall provide a secret code for subsequent identification upon receipt of the information in order to grant the Financial Reward.

Article 5-Protection and Safety Measures

The Special High Level Committee, in keeping with the degree of risk or danger, shall adopt the following measures for the protection and safety of the informant:

a) Police protection for the informant and his family, which may include a change of residence;

b) Withhold his identity and other personal information during proceedings.

Article 6- Secret Information

All information involving application of this Emergency Decree is secret. Any person who violates this provision, shall be administratively, civilly or criminally liable, as the case may be, in accordance with current law.

Article 7- Scope of the Financial Reward

The Department of Homeland Security shall pay the Financial Reward 24 hours after the actual

location and capture of Vladimiro Lenin Montesinos Torres. Said reward, as well as the measures for safety and protection, shall apply to nationals and foreigners.

Article 8-Government Loan

The Department of the Economy and Finance is hereby authorized to obtain a Government Loan with Banco de la Nación for up to US $5,000,000.00 (FIVE MILLION 00/100 UNITED STATES DOLLARS), earmarked for financing the issuance of the Financial Reward which is the object of the Emergency Decree; said funds shall be deposited in an account defined by the General Directorate of the Treasury for channeling to the Department of Homeland Security in the same currency as the pertinent disbursement is made.

The government loan shall be paid over a period of four (4) years, which includes a one-year (1) grace period and an option for early payment, in consecutive semi-annual installments, and if possible, in equal amounts, accruing interest at the LIBOR rate plus 3%.

Article 9- Servicing the debt

Services for pay off, interest and other expenses relating to this Government Loan shall be handled by the Department of the Economy and Finance, debited from funds provided therefore in accordance with inter-sectoral priorities and goals of the Sector in each fiscal year budget for Public Debt servicing.

Article 10- Exercise of the early payment option and charged to recoveries

The first funds recovered from the criminal acts object of this investigation, as set forth in the whereas clauses of this Emergency Decree, shall be earmarked for early pay off of the debt incurred in the Government Loan authorized in Article 8, until paid

in full, in exercise of the stipulated early payment option.

Article 11- Authorization to sign

The Secretary of the Economy and Finance or his appointee are hereby empowered to sign the loan contract, and the Director General of National Debt is also empowered to sign the other government loan documents authorized in the foregoing article.

Article 12- Schedule and payment

The National Government Budget Administration and the Public Treasury General Directorate shall schedule and draw, respectively, payable to the Department of Homeland Security section, up to the equivalent in legal tender of the amount indicated in this Emergency Decree, charged to the Supplementary Loan that shall be approved by the pertinent law and/or to the budgetary modifications on closing of Fiscal Year 2001, as stipulated in Law No. 27209, on Management of the National Budget.

Article 13-Approval

This Emergency Decree shall be approved by the Cabinet and the Secretaries of the Economy and Finance and Homeland Security.

Issued at the Government House in Lima on the sixteenth of April two thousand one.

VALENTIN PANIAGUA CORAZAO
Constitutional President of the Republic

JAVIER PÉREZ DE CUÉLLAR
Cabinet Council President

JAVIER SILVA RUETE
Secretary, Economy and Finance

ANTONIO KETIN VIDAL HERRERA
Secretary of Homeland Security

22266.

[Translator's note:] In the U.S., the Department of Homeland Security is equivalent to the Ministry of the Interior of the Republic of Peru.

CERTIFICATE OF ACCURACY

I, Esther Cecilia Crespo, an interpreter certified by the Administrative Office of the United States Courts, for and on behalf of Liaison Services, Inc., hereby certify that the foregoing translation, attached hereto and consisting of 2 page(s), is a true and accurate translation of the original document.

/s/ Esther Cecilia Crespo
Esther Cecilia Crespo
U.S. Court Interpreter • Translator

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ITEM	CODIGO	DESCRIPCION	UNIDAD
254	53470001	ULTRASONIDO PARA TERAPIA	UNIDAD
255	46100101	UNIDAD DE AUDIO ELECTRONICO - PANEL	UNIDAD
256	46100102	UNIDAD MATERIAL	UNIDAD
257	53470002	VELADOR CON LAMPARA INCANDESCENCIA	UNIDAD
258	67270002	VESTIDOR DE ACERO PARA LABORATORIO	UNIDAD
259	74000002	VIDEO CAMARA PARA CONFERENCIAS	UNIDAD
260	11270001	VITRINA EXHIBICION REFRIGERADA TIPO ABIERTO	UNIDAD
261	11270002	VITRINA EXHIBICION REFRIGERADA VERTICAL	UNIDAD
262	12670001	VITRINA CALEFACTORA	UNIDAD
263	46200001	ZAPATA PORTATIL	UNIDAD

RELACION DE TIPOS DE BIENES MODIFICADOS
REFERENTE A LA DENOMINACION

ITEM	CODIGO	BIEN	MODIFICADOR
1	74222205	DUPLICADORA CON EDITOR INTELIGENTE	DUPLICADORA CON EDITOR INTELIGENTE - DUPLICADORA DIGITAL
2	67270001	MANDRILADORA	MANDRILADORA
3	74222204	SISTEMA DE PROTECCION MULTIMEDIA	SISTEMA DE PROYECCION MULTIMEDIA - PROTECTOR MULTIMEDIA

§210 16/08/2001 - D.U. N° 049-2001.- Establece Compensación Económica a cambio de información veraz que permita la ubicación y captura de Vladimiro Montesinos Torres. *(22/08/2001)*

DECRETO DE URGENCIA N° 049-2001

EL PRESIDENTE DE LA REPUBLICA

CONSIDERANDO:

Que, las autoridades del Poder Judicial, el Ministerio Público y la Policía Nacional del Perú, se encuentran abocadas al esclarecimiento de los diversos ilícitos penales en que habrían incurrido diferentes funcionarios entre los años 1990 y 2000;

Que, entre dichos funcionarios destaca la persona de Vladimiro Lenin Montesinos Torres, que en el período establecido ejerció el cargo de Asesor en el Sistema de Inteligencia Nacional;

Que, la persona antes indicada estaría incursa en graves delitos que afectan la seguridad del Estado y a la sociedad en su conjunto, conforme a las evidencias que se vienen obteniendo en los procedimientos especiales e investigaciones judiciales que se llevan a cabo en aplicación de las Leyes N°s. 27378 [T.295,§154], 27379 [T.295,§155] y 27380 [T.295,§156] relativos a la criminalidad organizada;

Que, por tal motivo se encuentra requisitoriado por diferentes Juzgados, por ser presunto autor de delitos contra la Administración Pública, Corrupción de Funcionarios, Peculado, Contra la Vida, el Cuerpo y la Salud, Homicidio Calificado, Homicidio Agravado, Tráfico Ilícito de Drogas, Contra la Seguridad y otros;

Que, resulta necesario adoptar medidas excepcionales en materia económica y financiera para el otorgamiento de una compensación económica a favor de la persona o personas que proporcionen información veraz que permita la ubicación y captura de Vladimiro Lenin Montesinos Torres, de conformidad con el procedimiento que el presente Decreto de Urgencia establece;

Que, dichas medidas contribuirán con el esclarecimiento de los ilícitos penales que se encuentran en investigación en virtud de la cual existen razones de interés nacional que justifican su expedición en forma inmediata;

En uso de las facultades conferidas en el inciso 19) el Artículo 118° de la Constitución Política del Perú [T.211,§213];

Con el voto aprobatorio del Consejo de Ministros; y,

Con cargo de dar cuenta al Congreso de la República;

DECRETA:

Artículo 1°.- Compensación Económica

Establézcase una Compensación Económica ascendente a la suma de US$ 5 000 000,00 (CINCO MILLONES Y 00/100 DOLARES AMERICANOS), que será otorgada a la persona que proporcione información veraz que permita en forma directa la ubicación y captura de Vladimiro Lenin Montesinos Torres. Tratándose de varias personas que proporcionen dicha información, la compensación económica será distribuida entre éstas.

Artículo 2°.- Comisión Especial de Alto Nivel

Constituyase en el Ministerio del Interior una Comisión Especial de Alto Nivel con la finalidad de evaluar la información recibida y decidir el otorgamiento de la Compensación Económica. La Comisión Especial de Alto Nivel estará conformada por:

- Ministro del Interior, quien lo presidirá
- Viceministro del Interior.
- Director General de la Policía Nacional
- Director General de Inteligencia del Ministerio del Interior

Artículo 3°.- Información Veraz.

Para los efectos del presente Decreto de Urgencia se considera información veraz la que se proporcione por cualquier medio a la Comisión Especial de Alto Nivel, y que posibilite la ubicación y captura del requisitoriado Vladimiro Lenin Montesinos Torres.

Artículo 4°.- Uso de Seudónimo

El informante o los informantes podrán usar un seudónimo, en cuyo caso la Comisión Especial de Alto Nivel a la recepción de la información le asignará un código secreto que permita su posterior identificación para efecto del otorgamiento de la Compensación Económica.

Artículo 5°.- Medidas de Protección y Seguridad

La Comisión Especial de Alto Nivel, según el grado de riesgo o peligro, adoptará las siguientes medidas de protección y seguridad del informante:

a) Protección policial para el informante y su familia, que puede incluir el cambio de residencia.

b) Reserva de su identidad y demás datos personales en las diligencias que se practiquen.

Case 1:04-cv-23223-MGC Document 119-2 Entered on FLSD Docket 04/14/2008 Page 8 of 9

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Artículo 6°.- Información de Carácter Secreto

Toda información relacionada con la aplicación del presente Decreto de Urgencia tiene el carácter de secreto. Los que infrinjan esta disposición, incurren en responsabilidad administrativa, civil y/o penal, según corresponda, de conformidad con lo establecido en la legislación vigente.

Artículo 7°.- Alcance de la Compensación Económica

El Ministerio del Interior hará efectiva la Compensación Económica a las 24 horas de producción la ubicación y captura de Vladimiro Lenin Montesinos Torres. Dicha compensación así como las medidas de protección y seguridad, alcanzan a nacionales y extranjeros.

Artículo 8°.- Operación de Endeudamiento Interno

Autorízase al Ministerio de Economía y Finanzas a concertar una Operación de Endeudamiento Interno con el Banco de la Nación hasta por la suma de US$ 5 000 000,00 (CINCO MILLONES Y 00/100 DOLARES AMERICANOS), destinada a financiar el otorgamiento de la Compensación Económica a que se refiere el presente Decreto de Urgencia, dichos recursos serán depositados en una cuenta que para el efecto determine la Dirección General del Tesoro Público para su canalización a favor del Ministerio del Interior en la misma moneda en que se efectúe el desembolso correspondiente.

La operación de Endeudamiento Interno será cancelada en un plazo de cuatro (4) años, que incluye un (1) año de gracia, mediante cuotas semestrales consecutivas y en lo posible iguales, devengando una tasa de interés anual de Libor más un margen adicional de 3%, con opción de prepago.

Artículo 9°.- Servicio de la Deuda

El servicio de amortización, intereses y demás gastos que ocasione la presente operación de Endeudamiento Interno serán atendidos por el Ministerio de Economía y Finanzas, con cargo a los recursos que en función de las prioridades intersectoriales y metas del Sector le correspondan en cada Ejercicio Presupuestal para el servicio de la Deuda Pública.

Artículo 10°.- Ejercicio de la opción de prepago con cargo a recuperaciones

Las primeras recuperaciones de los recursos provenientes de los ilícitos penales materia de investigación señalados en la parte considerativa del presente Decreto de Urgencia serán destinadas a prepagar la deuda derivada de la operación de Endeudamiento Interno que autoriza el Artículo 8° hasta su cancelación total, en ejercicio de la opción de prepago establecida.

Artículo 11°.- Autorización de Suscripción

Autorízase al Ministro de Economía y Finanzas o a quien él designe, a suscribir el contrato de préstamo, así como al Director General de Crédito Público a suscribir los demás documentos de la operación de financiamiento interno que se autoriza en el artículo precedente.

Artículo 12°.- Calendarización y pago

La Dirección General del Presupuesto Público y la Dirección General del Tesoro Público calendarizarán y girarán, respectivamente, a favor del Pliego Ministerio del Interior hasta por el equivalente en moneda nacional del monto a que se refiere el presente Decreto de Urgencia, con cargo al Crédito Suplementario que se apruebe vía la norma legal pertinente y/o con cargo a las modificaciones presupuestarias al cierre del Año Fiscal 2001, dentro del marco de lo establecido en la Ley N° 27209 [T.283,§030], Ley de Gestión Presupuestaria del Estado.

Artículo 13.- Refrendo

El presente Decreto de Urgencia será refrendado por el Presidente del Consejo de Ministros y los Ministros de Economía y Finanzas y del Interior.

Dado en la Casa de Gobierno, en Lima, a los dieciséis días del mes de abril del año dos mil uno.

VALENTIN PANIAGUA CORAZAO, Presidente Constitucional de la República
JAVIER PEREZ DE CUELLAR YRIARTE, Presidente del Consejo de Ministros
JAVIER SILVA RUETE, Ministro de Economía y Finanzas
ANTONIO KELLY VIDAL BAZAN, Ministro del Interior

§211 20/04/2001 - D.U. N° 050-2001 **Amplía los alcances del Decreto de Urgencia N° 077-2000 que dispuso la transferencia a terceros de carteras de crédito de entidades del Sector Público encargadas a la Comisión Administradora de Carteras** *(22/04/2001)*

DECRETO DE URGENCIA N° 050-2001

SE AMPLIA LOS ALCANCES DEL DECRETO DE URGENCIA N° 077-2000

EL PRESIDENTE DE LA REPUBLICA

CONSIDERANDO:

Que mediante el Decreto de Urgencia N° 077-2000 [T.292,§119] se dispuso que la transferencia a terceros de las carteras de crédito de entidades del Sector Público encargadas a la Comisión Administradora de Carteras - CAC, estará a cargo de un Comité Especial de Privatización, el mismo que se constituyó mediante Resolución Suprema N° 435-2000-PCM;

Que, es necesario extender este tratamiento a otras carteras de crédito, permitiendo optimizar su gestión y recuperación;

Que, por tratarse de una medida de materia económica y financiera que permitirá un manejo eficiente de las finanzas públicas, existen razones de interés nacional que justifican su expedición en forma inmediata;

En uso de las facultades conferidas por el inciso 19) del Artículo 118° de la Constitución Política del Perú [T.211,§215];

CECILIA FRANCO
NOTARIA

CERTIFICO: QUE ESTA COPIA FOTOSTATICA ES IDENTICA A LA AMPLIACION DE SU ORIGINAL, EL CUAL HE TENIDO A LA VISTA, Y AL QUE ME REMITO EN CASO NECESARIO

LIMA, ... DE 01 ABR. 2008 DE .....

COLEGIO DE NOTARIOS DE LIMA

CECILIA HIDALGO MORAN
Notaria de Lima

JOSE L. MONTOYA VERA; SECRETARIO DEL COLEGIO DE NOTARIOS DE LIMA. CERTIFICA. Que la firma y sellos que anteceden en esta foja corresponden al (la) Notario (a) de Lima

Cecilia Hidalgo Moran

Comprobante N° 39242 Fecha: 04/04/2008

El Secretario certifica la firma del Notario mas no el contenido

COLEGIO DE NOTARIOS DE LIMA PERU

José L. Montoya Vera
SECRETARIO

MINISTERIO DE RELACIONES EXTERIORES
DIRECCION GENERAL DE ASUNTOS CONSULARES
Legalización N° 227810
Se legaliza la firma precedente del Sello
José L. Montoya Vera
SIN JUZGAR EL CONTENIDO DEL DOCUMENTO

Julia Adela Moreano de Dueñas
Departamento de Legalizaciones
Dirección de Fedatario Consulares

LIMA 09 ABR. 2008

Republic of Peru)
Province and City of Lima) ss:
Embassy Of the)
United States of America)

I certify that the official named below, whose true signature and official seal are, respectively, subscribed and affixed to the annexed document, was, on this day, empowered to act in the official capacity designated in the annexed document, to which faith and credit are due:

JULIA ADELA MOREANO DE DUENAS

This Embassy assumes no responsibility for the contents of the attached document.

/s/ JAMARI SALLEH
JAMARI SALLEH
Consul U.S. Embassy
Lima, Peru

April 10, 2008
Date

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

[Filed Aug. 15, 2008]

Case No. : 04-23223-CIV-COOKE/BANDSTRA

JOSE GUEVARA,

Plaintiff,

v.

REPUBLICA DEL PERU, MINISTERIO DEL INTERIOR DEL PERU, ANTONIO KETINVIDAL, and FERNANDO ROSPIGLIOSI,

Defendants.

FEDERAL BUREAU OF INVESTIGATION'S RESPONSE TO PLAINTIFF'S MOTION TO COMPEL COMPLIANCE WITH TRIAL SUBPOENAS

The United States Department of Justice, Federal Bureau of Investigation (the "FBI"), through the undersigned Assistant United States Attorney, responds to Plaintiff, Jose Guevara's "Motion to Compel Compliance with Trial Subpoenas or . . . to Perpetuate Testimony . . ." of Special Agents Kevin Currier and Waldo Longa as follows:

INTRODUCTION

Plaintiff Jose Guevara is suing Defendants Peru, *et al.*, to collect a $5 million reward Defendants allegedly offered for information leading to the capture and

arrest of an international fugitive, Vladimir Lenin Montesinos. Plaintiff has issued subpoenas for testimony at trial by FBI Special Agents Kevin Currier and Waldo Longa. Those Agents were involved in the FBI's search for Montesinos in late 2000 and 2001. Plaintiff alleges that, in response to a promise from the government of Peru which was communicated to him by the Special Agents, he provided information which led to Montesino's capture. Plaintiff seeks to elicit testimony from the Agents about "the specific facts leading up [to] the offer and acceptance by [Plaintiff] of the $5 million reward . . .". MOTION TO COMPEL, p.3.

Pursuant to the Federal Housekeeping Statute, 5 U.S.C. § 301, and the Supreme Court's decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951),[1] the Department of Justice treated the trial subpoenas issued to Special Agents Currier and Longa as requests for testimony under the DOJ's *Touhy* regulations at 28 C.F.R. § 16.21 *et seq*. As explained to Plaintiff after careful and thorough deliberation, the DOJ concluded that testimony concerning the FBI's search for Montesinos would necessarily reveal the FBI's theories in that case, its investigative sources and methods, and the identities of witnesses. The DOJ expressed its concern that the testimony sought would thus compromise ongoing

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[1] In *Touhy*, the Court upheld the authority of the Attorney General to prescribe regulations for the custody, use, and preservation of DOJ records. 340 U.S. at 468. As the Court noted, "[w]hen one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed, the necessity, of centralizing determination as to whether subpoenas *duces tecum* will be willingly obeyed or challenged is obvious." *Id*.

and future FBI investigations—a potential harm to the public which outweighed Plaintiff's need for the testimony in the prosecution of this civil lawsuit. The DOJ also determined that testimony sought implicated other common law and statutory privileges or bars on disclosure. For all of these reasons, the DOJ elected not to authorize the requested testimony.

The DOJ's denial of Plaintiff's requests for Agents Currier and Longa's testimony is subject to review under the Administrative Procedure Act (the "APA"), 5 U.S.C. § 701, *et seq.*, not Rule 45 of the Federal Rules of Civil Procedure. The APA requires that a court defer to an agency's decision so long as the decision was not arbitrary or capricious. As demonstrated below, the DOJ's decision in this case was neither arbitrary nor capricious. The Court should therefore defer to the DOJ's denial of Plaintiffs' requests for the Special Agents' testimony at trial and deny Plaintiff's Motion to Compel

ARGUMENT

I. The DOJ's Decision To Deny Authorization for Special Agents Currier and Longa's Testimony Must Be Upheld Because it Was Not Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance With Law

"[A] federal employee may not be compelled to obey a subpoena contrary to his federal employer's instructions under valid agency regulations." *Moore v. Armour Pharm. Co.*, 927 F.2d 1194, 1197 (11th Cir.1991) (quoting *Boron Oil Co. v. Downie*, 873 F.2d 67, 73 (4th Cir.1989)). The DOJ's *Touhy* regulations require that, in deciding whether to authorize an employee to testify in response to a subpoena, the DOJ official should consider "[w]hether such disclosure is

appropriate under the rules of procedure governing the case or matter in which the demand arose," and "[w]hether disclosure is appropriate under the relevant substantive law concerning privilege." 28 C.F.R. § 16.26(a). Among other things, the DOJ's *Touhy* regulations prohibit the disclosure of information that "would reveal a confidential source or informant, unless the investigative agency and the source or informant have no objection," or "would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired." *Id.* at § 16.26(b)(4), (b)(5).

The DOJ's decision not to permit the testimony of Special Agents Currier and Longa is a final agency action reviewable under the Administrative Procedure Act. *See* 5 U.S.C. § 704; *see also Moore*, 927 F.2d at 1197. The Court may not overturn the DOJ's decision unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Moore*, 927 F.2d at 1197. "To determine whether an agency decision was arbitrary and capricious, the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *N. Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1538 (11th Cir.1990) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989)).

The DOJ based its denial of Plaintiff's request for testimony from Special Agents Currier and Longa upon careful and thorough consideration of its law enforcement interests and Plaintiff's need for the

testimony. As noted above, the DOJ's *Touhy* regulations prohibit the disclosure of information that "would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired[.]" 28 C.F.R. § 16.26(b)(5). Where a disclosure would result in such harm, the DOJ cannot authorize such disclosure unless it determines that "the administration of justice requires disclosure." *Id.* § 16.26(c).

Applying the foregoing standard, the DOJ concluded that authorizing the testimony of Special Agents Currier and Longa would disclose certain investigatory procedures and techniques, thereby impairing their effectiveness in other investigations. Regardless of how it is characterized in the Motion to Compel, the testimony Plaintiff seeks to elicit from the Special Agents concerns the methods the FBI used in its search for Vladimir Montesinos. Essentially, Plaintiff seeks to elicit testimony that the Special Agents sought permission from the Peruvian government to convey an offer of reward to Plaintiff, that the Agents received such permission, that the Agents conveyed Peru's reward offer to Plaintiff, and that Plaintiff provided the information that led to Montesinos' capture.[2] Indeed, in the relevancy statement he submitted to DOJ in support of his trial subpoenas, Plaintiff noted that Special Agent Currier would testify about his formulation of a plan for the capture

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[2] Presumably, the testimony Plaintiff seeks to elicit from the two Special Agents mirrors the substance of the "Declaration of Kevin Currier" attached to the Motion to Compel. That Declaration and the disclosures made therein were not authorized by the DOJ and do not constitute an official statement of the FBI or a waiver of the rights and privileges asserted by the DOJ herein.

of Montesinos, his meeting and discussions with Peruvian officials for that purpose, and his communications with other FBI agents about the case. Such testimony would reveal in open court exactly how the FBI conducted its investigation and search for Montesinos. That is precisely the kind of disclosure the DOJ's *Touhy* regulations prohibit absent a finding that "the administration of justice requires disclosure." *Id.* § 16.26(c).

The term "administration of justice" refers to the government's role in "administ[ering]" its law enforcement duties through, for example, "pursu[it] [of] a civil or criminal prosecution or affirmative relief, such as an injunction." 28 C.F.R. 16.26(c). Assisting Plaintiff's efforts to collect on a foreign government's offer of a reward for the capture of a fugitive does not fit within any understanding of DOJ's duties to administer justice, or anything "require[d]" by those duties. The DOJ, therefore, concluded that disclosure was not required for the administration of justice and denied Plaintiff's requests for the Special Agents' testimony at trial.

II. Special Agent Currier is located More 100 Miles Outside of the Court's Jurisdiction

In addition to the reasons set forth above, the Court should decline to compel the testimony of Special Agent Currier at trial because, as Plaintiff concedes in his Motion, Agent Currier is located in Caracas, Venezuela—more than 100 miles outside of the Southern District of Florida—and, therefore outside the Court's jurisdiction to compel his attendance at trial. *See* Rule 45, Federal Rules of Civil Procedure.

CONCLUSION

For all of the foregoing reasons, Plaintiff's Motion to Compel the requested testimony should be denied.

Dated: August 15, 2008

Respectfully Submitted,

R. ALEXANDER ACOSTA
United States Attorney

By

/s/ Carlos J. Raurell
Carlos J. Raurell

Assistant United States Attorney
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Fax: (305) 530-7139
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Counsel for the Department of Justice, Federal Bureau of Investigation

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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Assistant United States Attorney

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-17213

JOSE GUEVARA,
Plaintiff-Appellee-Cross-Appellant,

LUIS ALFREDO PERCOVICH,
Intervenor-Appellant,

v.

REPUBLICA DEL PERU and
MINISTERIO DEL INTERIOR DEL PERU,
Defendants-Appellees-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF REPUBLICA DEL PERU

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, the undersigned counsel certifies that, to the best of his knowledge, the following persons, in addition to those listed in appellant's and appellee's opening briefs, are the only ones who may have an interest in the outcome of this case:

Nicholas Bagley, Attorney, U.S. Department of Justice;

Harold Hongju Koh, Legal Adviser, U.S. Department of State;

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Jeffrey H. Sloman, Acting United States Attorney;

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/s/ NICHOLAS BAGLEY

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STATEMENT REGARDING ORAL ARGUMENT

Because the panel already heard oral argument from the parties on January 13, 2010, the United States does not request oral argument. Should the Court schedule a second oral argument in the case, the United States believes that its participation would be useful to the Court and would request ten minutes of argument time.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOSE GUEVARA,
Plaintiff-Appellee-Cross-Appellant,

LUIS ALFREDO PERCOVICH,
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v.

REPUBLICA DEL PERU and
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Defendants-Appellees-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PERU

INTEREST OF THE UNITED STATES

Pursuant to 28 U.S.C. § 517 and Fed. R. App. P. 29(a), the United States files this *amicus curiae* brief in order to urge the Court to reverse the district court's judgment against the Republic of Peru under either international comity principles or the act of state doctrine. These justiciability doctrines are fully applicable here and foreclosed the district court from

issuing an $8.2 million judgment against Peru that overrode the decisions of high-level Peruvian government officials made in connection with the apprehension of a corrupt former Peruvian intelligence chief who had been hiding in Venezuela.

The district court's substantial judgment against Peru would, if affirmed, become a serious irritant in the United States' bilateral relationship with that nation. The judgment represents a serious affront to Peruvian sovereignty and is precisely the type of ruling that a United States court should not make because it hamstrings the Executive Branch's ability to carry out its foreign-relations responsibilities. Reversal under these circumstances is entirely consistent with precedent from the Supreme Court, this Court, and its sister Circuits applying the international comity and act of state doctrines.

We have taken the highly unusual step of filing an *amicus* brief after oral argument because the federal government has a profound interest in preventing the district court's judgment from undermining our nation's relationship with a stable democratic partner in South America. Moreover, the United States operates its own highly successful international reward programs, and the judgment here raises the troubling specter of foreign courts overriding decisions made by U.S. law enforcement and diplomatic officials.

As discussed below, this case arose because the President of Peru issued a formal executive decree offering a $5 million reward for information leading directly to the capture of Vladimiro Lenin Montesinos Torres, the former head of Peru's intelligence agency. The Peruvian President established a Special Committee of high-ranking officials within the Peruvian Interior Ministry to implement this reward program.

The committee was vested with exclusive authority to issue the reward, and provision was made for the committee to operate confidentially. In addition, the committee was empowered by the Peruvian President to make determinations concerning competing claims to the reward, and to decide how the available funds should be divided if more than one claimant qualified for compensation.

Plaintiff-appellee Jose Guevara was a Venezuelan intelligence official who offered information relating to Montesinos' whereabouts while in the temporary custody of the FBI as part of a federal criminal investigation of his conduct. Guevara provided this information while in the United States on a short trip. Not long after, he filed a claim in Peru for the $5 million reward.

The Peruvian Special Committee rejected Guevara's claim, reasoning that Venezuelan authorities had taken Montesinos into custody and that no evidence connected Guevara's information with those authorities. Guevara is now pursuing his claim against Peru in a United States court.

Notwithstanding the Peruvian government's authoritative resolution of Guevara's claims, the district court here ruled that the Special Committee's determination was incorrect and that Peru must therefore pay Guevara the entire $5 million reward, plus $3.2 million in interest. This ruling sets aside two Peruvian government decisions: (1) the conferral of exclusive authority on the Special Committee to administer the reward program; and (2) that committee's ultimate conclusion that Guevara had not demonstrated his entitlement to the reward.

The adjudication in a United States court of the validity of a sovereign determination by a foreign administrative tribunal is precisely what the international comity and act of state doctrines are meant to avoid. And, as alluded to already, the district court's judgment exposes actions taken by the United States in implementing parallel reward programs to reversal by foreign courts. This type of foreign court ruling would be especially problematic because U.S. officials make reward decisions on the basis of competing considerations such as the nature, quality, and accuracy of the information provided; how that information ties in with confidential information that the United States already had; the degree to which the information actually assisted the government; the need to protect sensitive sources and methods; the effect of payment on our national security interests; and whether non-payment would undermine the effectiveness of the program. Foreign judicial pronouncements on governmental decisions made by U.S. officials concerning these factors would obviously be inappropriate and unwelcome.

Thus, drawing either on principles of international comity or on the act of state doctrine, this Court should reverse the judgment against Peru. This Court should do so as an exercise of its discretion, whether or not Peru presented these arguments adequately to the district court. Full and proper application of these principles is of immense importance to the interests of the United States, and those interests should override any procedural problems created by Peru's litigation strategy.

STATEMENT OF THE CASE

In this brief, except where otherwise expressly noted, the United States takes the description of the

facts purely from Guevara's complaint, this Court's opinion in *Guevara v. Republica del Peru*, 468 F.3d 1289 (11th Cir. 2006), and the uncontested facts described in the district court record.

I. Factual Background.

During the 1990s, Vladimiro Lenin Montesinos Torres served as an adviser to Peruvian President Alberto Fujimori and as the head of Peru's National Intelligence System. In that capacity, Montesinos allegedly committed numerous crimes, including (but not limited to) bribery, influence peddling, drug trafficking, money laundering, unlawful arms trafficking, and murder. He was caught on videotape offering a bribe to a legislator-elect in September 2000, which led almost immediately to the collapse of the Fujimori government.

Montesinos went into hiding and an international manhunt ensued. In April 2001, the President of Peru issued an Emergency Decree offering a $5 million reward to "the person or persons who provide(s) accurate information that will directly enable locating and capturing" Montesinos. DE 119-2, at 2 (Emergency Decree).[1] The decree established a Special High Level Committee within the Peruvian Ministry of the Interior "for the purpose of evaluating information received and deciding on granting the financial reward." *Id.* And "accurate information" was defined to mean information "provided through any means to the Special High Level Committee and which enables locating and capturing" Montesinos. *Id.* The four-person committee was made up of the Minister of the Interior, his immediate subordinate, the Director

[1] "DE" refers to the docket entry number on the district court docket.

General of the National Police, and the Director General of Intelligence for the Interior Ministry. *Id.* "In the event several persons provide the said information," the decree provides, "the financial reward shall be divided among them." *Id.* The Special Committee was charged with taking "measures for the protection and safety of the informant"; consistent with that need for confidentiality, "[a]ll information involving application of this Emergency Decree is secret." *Id.* at 2-3.

In the meantime, Montesinos had secretly taken refuge in Venezeula. A member of the Venezuelan intelligence service, plaintiff-appellee Jose Guevara, provided Montesinos with a safe house and a security detail. As he ran short on money, Montesinos "sent Guevara on trips to Lima, Bogota, Miami, and Nassau, Bahamas, in a desperate search for more money." DE 333, at 3. On Guevara's third such trip to Miami in June 2001 to meet with an employee at a Miami bank on Montesinos' behalf, the FBI took Guevara into custody.

According to Peru, Guevara was "charged with fraud against the United States and extortion of the family of a bank official * * * in an effort to access $43 million of Montesinos' deposits at a Miami bank." Appellant's Br. 3. The FBI told Guevara that the case in the United States would be dropped if he provided information concerning Montesinos' whereabouts. The FBI agents in Miami consulted over the telephone with a Peruvian official, who confirmed that a $5 million reward for information leading to Montesinos' capture was available to Guevara. *See* DE 230, at 3. In light of his discussions with the FBI and Peru's reward program, Guevara decided to cooperate, and he placed a telephone call to a colleague in Venezuela.

Id. Montesinos was arrested the following day by Venezuelan authorities. *Id.*

Guevara then sought to collect the reward in Peru. In 2002, the Peruvian government's Special Committee agreed to process Guevara's request for the reward. Guevara was not the only claimant, however: a handful of others—including the bank employee with whom Guevara met in Miami—also submitted claims.

In 2005, the Special Committee notified Guevara that his request for the reward had been denied. DE 201-9. The Peruvian government did not in its notice provide an explanation for its decision; Peru instead informed Guevara that, pursuant to the terms of the Emergency Decree, that information was considered confidential. Guevara was nevertheless invited "to read the Resolution related to your request" at a Peruvian ministry office. *Id.* In a declaration submitted to the district court, a former Peruvian Minister of the Interior and member of the Special Committee explained that Guevara's reward claim had been rejected because "the acts of the Venezuelan military were an intervening event that broke the chain of causation" between Guevara's assistance and Montesinos' capture. Costa Decl., DE 326-4 ¶16; *see also* Rospigliosi Dep., DE 201-3, at 21.

II. Judicial Proceedings in the United States.

In 2004, Guevara filed a breach-of-contract action in a Florida state court against Peru to recover the $5 million reward. The case was removed to the United States District Court for the Southern District of Florida, which concluded that Peru was immune from suit under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1604, 1605. In the district court's view, offering a reward for the capture of a criminal

was a sovereign, and not a commercial, act. (Shortly before the district court issued its decision, the Venezuelan Supreme Court of Justice had rejected a separate claimant's suit effort to sue Peru for the reward in Venezuela on the similar ground that the Peruvian President's issuance of the Emergency Decree was a sovereign act not subject to challenge in Venezuelan courts. *See* Decision of February 17, 2004 (available at http://www.tsj.gov.ve/decisiones/jspa/Febrero/03-1314.htm)).

This Court reversed in November 2006. *Guevara v. Republica del Peru*, 468 F.3d 1289 (11th Cir. 2006). The Court found that Peru's reward offer was a unilateral offer to enter into a contractual relationship. And under the FSIA, this Court held, a contract for the provision of information is a commercial contract and is not inherently sovereign. The case was therefore remanded for further proceedings.

On remand, the district court granted summary judgment against Peru. In the court's view, the Special Committee's 2002 resolution indicating that Guevara's claim had been accepted for consideration established that Guevara had, in fact, provided information that led directly to Montesinos' capture. DE 230, at 6-7. The court rejected Peru's argument that the capture of Montesinos by Venezuelan authorities, and not by Peruvian authorities, raised an issue of fact as to whether Guevara's provision of information had led directly to Montesinos' arrest. "In the absence of evidence to the contrary, it appears that Venezuela learned of Montesinos's location from Guevara and would have been unable to capture him had Guevara not cooperated." *Id.* at 8. The court also rejected Peru's evidence regarding the Special Committee's deliberations, and it closed its analysis by

criticizing the secrecy of the proceedings, discounting for that reason the significance of Peru's formal letter rejecting Guevara's claim. *Id.* at 9-10.

The district court subsequently entered final judgment against Peru. Under that judgment, the court ordered Peru to pay Guevara the entirety of the $5 million reward, plus more than $3.2 million in prejudgment interest. DE 346. Peru appealed. DE 349. In its opening appellate brief to this Court, Peru argues, among other things, that international comity and the act of state doctrine should have prevented the district court from entering a judgment against Peru contradicting the decision by the Peruvian government that Guevara was not entitled to payment of the reward. Appellant's Br. 40-42.

SUMMARY OF ARGUMENT

In practical effect, Jose Guevara's lawsuit against the Peruvian government in the United States is both a collateral attack in another nation's courts on the Special Committee's decision that he was not entitled to the reward and a challenge to the authority of the Peruvian President to delegate to the Special Committee the exclusive authority to administer the reward program. Not only would the district court's order requiring the Peruvian government to pay the reward violate the act of state doctrine, which the Supreme Court has held to have "constitutional underpinnings." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964). It would also, if affirmed, introduce considerable friction into the United States' bilateral relationship with Peru. To protect the prerogatives of the Executive Branch in its conduct of foreign affairs, both the act of state doctrine and principles of international comity generally preclude U.S. courts from reviewing and overriding the

sovereign decisions of foreign states and foreign tribunals. Particularly because this judgment against Peru presents two serious foreign-relations dilemmas for the United States, the doctrines are fully applicable here.

First, the district court's entry of a multi-million djudgment against Peru would, if affirmed, become an irritant in the United States' relationship with that country. Peru justifiably believes that the district court overstepped its authority when it overrode the authoritative decision of the Special Committee denying Guevara's claim for the reward. Second, the United States itself administers several reward programs for the capture of international fugitives. To preserve the ability of U.S. officials to make delicate and context-sensitive judgments about whether an individual is or is not entitled to a reward, decisions made pursuant to those reward programs are generally not subject to judicial review even in domestic courts. Yet the district court's judgment stands as an invitation to *foreign* courts to accept jurisdiction over litigation challenging decisions by U.S. officials concerning reward claims. The threat of oversight by foreign courts would not only seriously hamper the administration of these important reward programs; it would also present the risk that foreign courts will demand the release of confidential information relating to ongoing law enforcement investigations—or even order the U.S. to disclose classified information.

The United States therefore urges this Court to reverse the judgment against Peru on the ground that it accords neither with international comity nor with the act of state doctrine. We recognize that Peru has argued in the alternative that its commercial activity lacked a sufficient nexus to the United States

to fall within the commercial activity exception. Because resolving the nexus argument in this very unusual case could have far-reaching implications for future litigation, we ask the Court to reverse the judgment on international comity and act of state grounds, which themselves render the suit non-justiciable.

ARGUMENT

I. International Comity and the Act of State Doctrine Require Reversal of the District Court's Judgment Against Peru.

As explained above, a high-level committee within the Peruvian government vested with the exclusive authority to administer a $5 million reward for information leading directly to Montesinos' capture considered and rejected Guevara's claim for that reward. In nonetheless ordering Peru to pay Guevara the entirety of the $5 million reward, plus millions in interest, the district court contradicted the determination of a foreign tribunal and arrogated to itself authority that the President of Peru had delegated to that tribunal. As we explain below, principles of international comity demanded that the district court abstain from overriding the decision of the Special Committee to reject Guevara's claim for the reward. And the act of state doctrine prohibited the district court from invalidating the Peruvian President's establishment of an exclusive mechanism for administering the reward.

A. International Comity.

"International comity"—"the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation," *Hilton v. Guyot*, 159 U.S. 113, 164 (1895)—has two forms. Pre-

scriptive comity (also called the "comity of nations") is a doctrine under which courts construe "ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). The second form—at issue in this case—is the "comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting). Although the comity of courts is an abstention doctrine that is typically invoked when a U.S. court declines to exercise jurisdiction in deference to parallel judicial proceedings in a foreign state, *see Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713-14 (2d Cir.1987), it applies equally in cases involving the decisions of foreign administrative tribunals. *See Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237-40 (11th Cir. 2004) (finding that international comity required dismissal of domestic claims in deference to the compensation determinations of a foreign administrative tribunal).

In deciding whether to defer on comity grounds to the decision of a foreign tribunal, this Court weighs at least four factors: "(1) whether the foreign court was competent and used 'proceedings consistent with civilized jurisprudence,' (2) whether the judgment was rendered by fraud, * * * (3) whether the foreign judgment was prejudicial because it violated American public policy notions of what is decent and just"; and (4) "whether the central issue in dispute is a matter of foreign law and whether there is a prospect of conflicting judgments." *Id.* at 1238. The strength of the United States' interests and the interests of the foreign state are also important to the analysis. *Id.* at 1239.

These factors compel application of the comity doctrine to preclude review in U.S. courts of Peru's determination that Guevara was not entitled to the reward. DE 201-9. Of greatest significance, the district court's judgment not only "creates a prospect of conflicting judgments," but actually *does* conflict with the Special Committee's decision. The conflict is particularly striking because the central issue in dispute in this case is whether Guevara satisfied the terms of the *Peruvian* reward program.

The potential for conflict runs much deeper than the district court's decision merely to overturn a single decision of the Special Committee. The Peruvian President's Emergency Decree caps the total reward amount at $5 million. In the event that more than one person provided information leading to Montesinos' arrest, the Special Committee was charged with "divid[ing] among" those persons the $5 million sum. DE119-2, at 2. The district court's $8.2 million judgment against Peru, however, not only exceeds that $5 million cap. More significantly, it means that other courts—both in the United States and elsewhere—could enter another judgment awarding the same $5 million. That result would thwart the Peruvian government's effort to cap the total amount it disbursed in connection with the Emergency Decree, and to provide for appropriate divisions where necessary.

The Special Committee's determination is precisely the sort of decision by a foreign governmental body to which U.S. courts owe deference. Its competence is beyond dispute: the Special Committee comprised four high-level Peruvian officials from law enforcement and the Ministry of the Interior, including the Minister himself. DE 119-2, at 2. Their accumulated

expertise in law enforcement and intelligence put them in a very strong position to ascertain whether certain information did or did not lead directly to Montesinos' capture. And so far as the evidence in the record shows, the Special Committee was fully authorized under Peruvian law to make this determination and its conclusion lay within its lawful discretion.

In the district court, Peru submitted a declaration from a former Peruvian Minister of the Interior who served on the Special Committee from 2001 to 2003. That declaration described the Committee's deliberations, its collection of information, its consideration of testimony, and its repeated requests for more information from the FBI and Guevara's counsel about Guevara's assistance. *See* Second Decl. of G. Costa Santolalla, DE 326-4. This former minister stated without contradiction that Guevara's reward claim was rejected because the available evidence did not support the conclusion that Guevara provided the information leading directly to Montesinos' capture. *Id.* ¶ 16. Instead, "the Special Committee concluded that the acts of the Venezuelan military were an intervening event that broke the chain of causation between Mr. Guevara's telephone call * * * and the arrest of Montesinos." Costa Decl., DE 326-4, ¶ 16. The Minister's declaration was corroborated by a deposition from another former Peruvian Minister of the Interior who served on the Committee from 2001 to 2002 and from 2003 to 2004. Depo. of Fernando Rospigliosi, DE 201-3, at 21.

Nothing in the record suggests that the Committee's determination was tainted by fraud or otherwise violated United States public policy. Indeed, it would be perfectly consistent with U.S. policy to deny a

reward claim in a case in which insufficient evidence connected the information to the eventual arrest, a third party's intervention made the proffer of information irrelevant, or a claimant failed to satisfy the terms of the reward offer. Just as decisions based on such factors by U.S. officials are not amenable to challenge in foreign tribunals, so too should Peru's determination be insulated from collateral attack in U.S. courts.

Deference to the Special Committee's decision is all the more appropriate given that the district court's invalidation of that decision, if affirmed by this Court, could adversely affect the United States' relationship with Peru. That is particularly true here because the target of the $5 million reward was not some common criminal. The Montesinos affair was an international cause célèbre. Montesinos was an infamous former high-level official accused of (and in some cases convicted of) "crimes against government administration, public corruption, embezzlement, crimes against persons, aggravated murder, national security and other[crimes]." DE 119-2, at 2. His arrest was the precipitating event in the collapse of the Fujimori presidency, and both Montesinos and Fujimori have since been convicted in Peruvian courts of serious abuses of power. *See id.* (stating in the Emergency Decree that various officials committed illegal acts between 1990 and 2000, and that Montesinos "stands out among said officials" because of his "involve[ment] in serious crimes which affect the security of the State and society overall").

Even the circumstances of Montesinos' capture were a source of foreign-relations controversy. Although President Hugo Chavez and other Venezuelan officials claimed that Venezuela was single-handedly

responsible for Montesinos' arrest, many Peruvians suspected that Venezuelan authorities had knowingly harbored him. *See* Clifford Krauss, *Former Spy Chief of Peru Captured in Venezuela Lair*, N.Y. Times, June 25, 2001. That the Special Committee's decision arose against the backdrop of a sensitive regional political controversy provides a particularly compelling reason to defer to Peru's handling of the reward question. Given the delicacy of the issue, the Special Committee was entitled to do its work without second-guessing from courts in other countries, including the United States.

Further, and contrary to the district court's view, DE 230, at 9-10, the fact that the Special Committee's reasoning was confidential provides no reason to question its conclusions. As the Emergency Decree makes clear, the evidence presented to the Committee, its deliberations, and its reasoning were to be kept secret in order to protect the safety of claimants. *See* DE 119-2, at 2-3 (directing the Special Committee to adopt specific measures "for the protection and safety of the informant," authorizing claimants to use pseudonyms, and requiring "[a]ll information involving application of this Emergency" to be kept "secret"). Despite these valid concerns, the Special Committee expressly invited Guevara to review the record of its decision within a Peruvian ministry. DE 201-9.

In any event, the Peruvian government's interest in preserving the confidentiality of proceedings touching on sensitive law enforcement functions mirrors the United States' own interest in protecting informant confidentiality and preserving the secrecy of classified information. *See* 5 U.S.C. § 552(b)(1), (7) (protecting classified information and certain "records

or information compiled for law enforcement purposes" from disclosure under the Freedom of Information Act); *cf. Tenet v. Doe*, 544 U.S. 1, 8 (2005) (holding that "[p]ublic policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential" (internal quotation and emphasis omitted)).

Over and above these concerns, the United States has a substantial interest in forestalling reciprocal litigation in foreign tribunals that would interfere with the administration of U.S. reward programs. The State Department, for example, administers three rewards programs that target some of the most dangerous classes of international fugitives: Rewards for Justice, the Narcotics Rewards Program, and Rewards for Information Concerning Individuals Sought for Serious Violations of International Humanitarian Law Relating to the Former Yugoslavia or Rwanda. *See* 22 U.S.C. § 2708.

These three programs fund payments for information leading to the arrest of international terrorists, narco-traffickers, and war criminals, respectively. Under the auspices of the reward programs, the Secretary of State determines, with input from the Interagency Rewards Committee (a group composed of Executive Branch officials), whether to pay a reward and, if so, the amount to be paid. The Department of Defense administers a similar reward program for persons providing "information or nonlethal assistance" in aid of an operation against international terrorism. 10 U.S.C. § 127b(a).

Under all of these U.S. reward programs, a decision to grant or deny a reward is by law "final and conclusive and is not subject to judicial review." 22

U.S.C. § 2708(j); 10 U.S.C.§ 127b(g). This policy makes eminent sense. The federal officials who administer these reward programs must balance a range of competing considerations in deciding whether to grant or deny an individual's claim. As noted earlier, those considerations include the nature and quality of the information provided, the accuracy of the information, whether the individual providing the information is eligible for payment under the terms of the relevant statute or regulation, whether the same or comparable information was obtained from other sources, the degree to which that information actually led to the apprehension of a suspect, the need to protect sensitive sources and methods, whether payment is consistent with national security, and whether nonpayment would undermine the effectiveness of the rewards program. Major and obvious problems would arise if these U.S. reward program decisions were subject to invalidation in foreign courts.

Yet the district court's judgment here seriously threatens to expose decisions that Congress insulated from review in domestic courts to adjudication in foreign tribunals. The risks of such reciprocal litigation are manifold. Foreign courts cannot be counted upon to be sensitive to the wide range of concerns that U.S. officials must take into account in deciding whether or not to grant a reward. And federal officials would likely feel constrained in the exercise of their duties if their decisions were subject to later judicial review in a foreign state. In addition, in attempting to decide whether the terms of a reward program were satisfied, foreign courts might well order intrusive discovery into what precisely a confidential informant told law enforcement officials and how that information did (or did not) satisfy the terms of the reward program. And courts in other

countries may be unsympathetic to U.S. efforts to invoke the law enforcement privilege or to resist the disclosure of classified information.

As if to illustrate the point, the district court in this very case was asked by both parties to compel the FBI to disclose extraordinarily sensitive law enforcement information. *See, e.g.*, DE 289 (providing the FBI's response to Peru's motion to compel discovery). Foreign courts would certainly be presented with precisely the same sorts of requests. Furthermore, the district court rested its decision to grant judgment against Peru in part on the *absence* of evidence in the record to rebut the inference that Guevara provided information leading to Montesinos' arrest. *See* DE 230, at 8 (stating that, "[i]n the absence of evidence to the contrary, it appears that Venezuela learned of Montesinos's location from Guevara and would have been unable to capture him had Guevara not cooperated"). That line of reasoning suggests that a domestic law enforcement agency's resistance to discovery demands could justify a foreign court's decision to overrule a U.S. determination that a particular claimant is not entitled to a reward.

For all of these reasons, international comity precluded the district court from undertaking a review of the factual and legal determinations of the Special Committee. *See Hilton*, 159 U.S. at 202-03 (holding that where "comity of this nation" calls for recognition of a judgment rendered abroad, "the merits of the case should not * * * be tried afresh").

B. Act of State Doctrine.

For many of the same reasons, the district court's judgment against Peru violates a related but separate doctrine—the act of state doctrine. "[I]n its traditional

formulation," the act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

The doctrine was "once viewed * * * as an expression of international law, resting upon the highest considerations of international comity and expediency," *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 404 (1990) (internal quotation marks omitted), but was described by Justice Harlan in *Sabbatino* as a doctrine with "'constitutional' underpinnings," reflecting "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder" the conduct of foreign affairs, *Sabbatino*, 376 U.S. at 423.

In this case, the district court's judgment granting Guevara's claim for the reward invalidated Peru's ultimate decision to deny Guevara's claim. That by itself violated the act of state doctrine. But the court's judgment also invalidated the President of Peru's establishment of a specialized tribunal vested with sole responsibility for determining in confidential proceedings whether an individual had satisfied the condition for receiving the reward.

Peru clearly intended the Special Committee's determinations to be exclusive. The four-person Committee was established "for the purpose of evaluating information received and deciding on granting the financial reward," and the reward was due only if information was "provided through any means to the Special High Level Committee." DE 119-2, at 2. Per the Emergency Decree, the Special

Committee alone was charged with assessing the accuracy of the information and with providing protection to an informant who was in danger because of his cooperation. *Id.* And the Emergency Decree contemplated that the Special Committee would divide the total reward among the claimants entitled to it. *Id.* at 2-3.

These provisions are in no sense compatible with having multiple tribunals in different countries address a claimant's entitlement to the reward. Thus, in assuming the authority to dispense the $5 million reward, the district court invalidated the President of Peru's delegation of exclusive decision-making authority to the Special Committee. The act of state doctrine serves to protect against precisely that sort of invalidation. *See Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (holding that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory"). That is particularly so where, as here, the Peruvian President's delegation involved questions relating to the capture of an infamous former government official and where the district court's judgment would, if affirmed, create diplomatic friction. *See Kirkpatrick*, 493 U.S. at 409 (holding that "the policies underlying the act of state doctrine should be considered in deciding whether" it should be applied).

The application of the act of state doctrine here is in no way undermined by this Court's prior conclusion that the Peruvian reward offer constituted a commercial contract. The law of this Circuit is that "there is no commercial exception to the act of state doctrine." *Honduras Aircraft Registry, Ltd. v. Honduras*, 129 F.3d 543, 550 (11th Cir. 1997); *Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1254 n.2

(11th Cir. 2006) (same); *see also International Association of Machinists v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981).

Even assuming that a commercial activity exception existed, the only potential commercial activity at issue here was Peru's extension of the reward offer. The Peruvian President's distinct decision to delegate exclusive authority for deciding who is (and is not) entitled to the reward was non-commercial sovereign activity. *Cf. Horowitz v. United States*, 267 U.S. 458, 461 (1925) (distinguishing between the United States' "public and general acts as a sovereign" and those acts undertaken in connection with a commercial contract). Private parties cannot and do not delegate to specialized committees composed of high-ranking government officials the power to adjudicate whether the conditions of a law-enforcement reward offer have been satisfied. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (holding that an act is commercial only if "the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce" (internal quotation marks omitted)). Under the act of state doctrine, that sovereign delegation should not be subject to review in United States courts. *Cf. Society of Lloyd's v. Siemon-Netto*, 457 F.3d 94, 102-103 (D.C. Cir. 2006) (holding that the act of state doctrine barred an argument that an English statute unlawfully delegated authority to Lloyd's, a private company).

C. Forfeiture.

The parties dispute whether Peru preserved these justiciability claims in the district court. Whatever the merits of that dispute, the principle that an appellate court will not pass on forfeited arguments

is "not a jurisdictional limitation but merely a rule of practice, and the decision whether to consider an argument first made on appeal is left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360 (11th Cir. 1984) (internal quotations, footnotes, elision, and correction omitted).

As we have explained, upholding the judgment against Peru could have deleterious consequences both for the United States' bilateral relationship with Peru and for the administration of federal reward programs. Standing alone, those potential consequences are sufficiently serious that this Court should exercise its discretion to consider the act of state and international comity arguments. As the Seventh Circuit has noted in a related context, "federal-state comity interests can be considered for the first time on appeal," and the case for overlooking waiver is even "stronger" when the arguments presented touch on "international comity, amity, and commerce." *Fortino v. Quasar Co.*, 950 F.2d 389, 391 (7th Cir. 1991).

The United States has a substantial independent interest in presenting the act of state and international comity arguments to this Court, over and above what Peru may have argued. The two doctrines "aris[e] out of the basic relationships between branches of government in a system of separation of powers," *Sabbatino*, 376 U.S. at 423, and exist in part "to promote cooperation and reciprocity with foreign lands," *Pravin Banker Associates, Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997). The Court should consider and address even late-raised arguments that serve to protect the Executive

Branch's prerogatives, whether or not a party has presented them.

Indeed, even if the United States were not participating, the exceptional nature of this case would warrant this Court's review of any forfeited international-abstention arguments. The strictly legal issues presented by the arguments clearly "presen[t] significant questions of general impact or of great public concern." *Dean Witter Reynolds, Inc.*, 741 F.2d at 361; cf. *Granberry v. Greer*, 481 U.S. 129, 134 (1987) (noting that "principles of comity" may be "better served by addressing the merits forthwith" of forfeited arguments). This Court should therefore exercise its discretion to consider the arguments pertaining to international comity and the act of state doctrine.

II. This Court Need Not Resolve Whether Peru's Reward Offer Had a Sufficient Commercial Nexus to the United States.

As an alternative basis for reversal, Peru has argued that its reward offer bore an insufficient relationship to the United States, and that its commercial activity therefore fell outside the commercial activity exception to the immunity otherwise imposed in the Foreign Sovereign Immunities Act (FSIA).[2] As

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[2] When this Court previously held that Peru's extension of the reward offer amounted to commercial activity, it did not address (because it was not asked to) whether the activity bore the requisite connection to the United States. On remand, the district court declined to consider the question because it appeared to believe that this Court's prior decision "established" the district court's jurisdiction. DE 230, at 10. The nexus argument, however, implicates this Court's subject matter jurisdiction and thus remains viable. *See Harris v. United States*, 149 F.3d 1304, 1308 (11th Cir. 1998) (holding that "the parties are incapable of

relevant here, the exception provides that a sovereign is not immune from suit in any case "in which the action is based * * * upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

The United States takes no position on the highly fact-bound question whether any act undertaken by Peru had a "direct effect in the United States" within the meaning of the FSIA. Nor need the Court resolve this issue, which, although it arises here in an unusual factual setting involving a foreign government's law enforcement reward program, could materially affect the scope of federal court jurisdiction over quintessentially commercial disputes between domestic corporations and foreign states. As noted, the justiciability grounds discussed above—that the judgment violates principles of international comity and the act of state doctrine—provide an alternative and sufficient basis for reversal.

There is no obstacle to addressing international comity and the act of state doctrine before resolving whether this Court has subject-matter jurisdiction. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998), requires a federal court to "prioritize [a] jurisdictional issue only when the existence of *Article III* jurisdiction is in doubt." *Chalabi v. Hashemite Kingdom of Jordan*, 543 F.3d 725, 728 (D.C. Cir. 2008). The Supreme Court, however, "explicitly recognized [in *Steel Co.*] the propriety of addressing the merits where doing so made it possi-

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conferring upon us a jurisdictional foundation we otherwise lack simply by waiver or procedural default").

ble to avoid a doubtful issue of statutory jurisdiction." *Id.* (internal quotation omitted). And although they are not jurisdictional in nature, the act of state doctrine and international comity are "threshold question[s]" designed "to preclude judicial inquiry," and as such can properly be addressed before questions of statutory jurisdiction. *Tenet*, 544 U.S. at 6 n.4.

CONCLUSION

For the foregoing reasons, the judgment entered by the district court against the Government of Peru should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2010, I caused an original and six copies of the foregoing brief to be filed with the Court by Federal Express. On the same date, I also caused an electronic copy to be filed with the Court, and caused copies to be served on the following counsel by Federal Express and email:

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(5) and (6), I certify that this brief has been prepared in a fixed-spaced typeface using Corel WordPerfect 12 in 12-point Book Antiqua font. I further certify that pursuant to Fed. R. App. P. 32(a)(7)(B) that the foregoing brief contains 6,479 words, according to the word count of Corel WordPerfect 12. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/
NICHOLAS BAGLEY

MARCH 2010

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(3)

No. 10-389

In the
Supreme Court of the United States

JOSE GUEVARA,

Petitioner,

v.

REPUBLICA DEL PERU, AND
MINISTERIO DEL INTERIOR DEL PERU,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

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ARGUMENT

Respondents' brief in opposition to the Petition underscores the need for review by this Court. First, Respondents simply ignore the clear split among the circuits as to what constitutes a "direct effect" sufficient to vest a court with jurisdiction under the "commercial activity" exception to the Foreign Sovereign Immunities Act. Although this Court addressed the question presented in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1993), it did not settle the issue. Indeed, as the Petition makes clear, the circuits split almost immediately following *Weltover*.

Second, contrary to Respondents' assertions, the Eleventh Circuit squarely addressed whether Respondents' actions satisfied the jurisdictional nexus of the commercial activity exception's third clause, *i.e.*, whether Respondents' conduct caused a "direct effect" in the United States. And, critically, the Eleventh Circuit did so at Respondents' request. Thus, Petitioner never waived the nexus issue before the Eleventh Circuit. Indeed, Respondents repeatedly concede as much throughout their brief in opposition.

Third, Respondents wrongly argue that the Eleventh Circuit's decision here did not deepen the split among the circuits. While the Eleventh Circuit may not have referred directly to the Second Circuit's "legally significant act" test, the court's reasoning clearly indicates that the Eleventh Circuit firmly sits in the Second Circuit's camp. This case therefore presents an ideal vehicle for the Court to resolve the circuit split.

Fourth, public policy favors requiring Respondents to honor their reward offer. As the Eleventh Circuit made clear in *Guevara I*, Respondents' refusal to pay the reward threatened to undermine the viability of similar reward programs sponsored by other nations like the United States. While the FBI supported Petitioner's claim to the reward, the Department of State opposed payment. This gap between law enforcement and diplomatic priorities further confirms the importance of the question presented.

1. Respondents ignore the existence of a clear conflict among the circuits interpreting the commercial activity exception to the Foreign Sovereign Immunities Act. Respondents make the bold assertion that the circuit split interpreting the FSIA's jurisdictional nexus requirement is "illusory," Resp.[1] at ii, and dismiss the Petition as nothing more than "an academic discussion of the 'legally significant act' test in the courts," *id.* at 13-14. As with Respondents' recitation of the "facts,"[2] nothing could be further from the truth.

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[1] "Resp. at ___" refers to Respondents' Brief in Opposition to Petition for Writ of Certiorari. "Pet. at ___" refers to the Petition for Writ of Certiorari.

[2] The lion's share of Respondents' brief is devoted to a skewed, if not outright, misrepresentation of the facts presented to the district court. The district court's order granting Petitioner summary judgment was entered at DE-230. The majority of Respondents' so-called "evidence" was presented *after* the district court's ruling and therefore did not merit a response from Petitioner. In any event, Petitioner challenged Respondents' "evidence" at the district court level, because Respondents' late-filed "evidence" lacked foundation, authenticity, and constituted inadmissible hearsay. *See* DE-291, 301, 319.

The circuit courts of appeal have acknowledged the split on numerous occasions. The Sixth Circuit noted that "the circuits have framed the inquiry differently" in determining when a "direct effect" is sufficiently present to invoke a court's jurisdiction. *See Am. Telecom Co., L.L.C. v. Republic of Lebanon*, 501 F.3d 534, 540 (6th Cir. 2007) (recognizing that "the Second and Ninth Circuits require a 'legally significant act' in order to find a direct effect, the Eighth and Tenth Circuits find the legally-significant-act test helpful but not required, and the Fifth and Sixth Circuits have renounced any legally-significant-act test") (internal citation omitted).

Similarly, the Tenth Circuit recently highlighted the deep division among the circuits interpreting the commercial activity exception's "direct effect" clause. *See Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 998 (10th Cir. 2007) (noting that the Second and Ninth Circuits have adopted the "legally significant acts" test, while the Fifth and Sixth Circuits have expressly rejected the test). Even among the circuits that have adopted the "legally significant act" test, there are divisions as to whether the foreign sovereign's legally significant act must occur within – or without – the United States. *See id.*

Legal scholars have also identified the "confusion and controversy" ignited among the circuits following this Court's decision in *Weltover*. *See* Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts Like a Private Party, Treat it Like One*, 5 CHI. J. INT'L L. 675, 687 (2005); *see also* David E. Gohlke, *Clearing the Air or Muddying the Waters? Defining "A Direct Effect in the United States" Under the Foreign Sovereign*

Immunities Act After Republic of Argentina v. Weltover, 18 HOUS. J. INT'L L. 261, 285 (1995) (stating that the "[a]pplication of the direct effects clause of the commercial activities exception has been *varied and unpredictable*, and the *unworkability* of the 'immediate consequences' test was implicated by at least one court") (emphasis added).

This case would permit the Court to resolve the split among the circuits and create a uniform jurisdictional test to guide the lower courts on an issue which this Court has characterized as the "most significant of the FSIA's exceptions." *Weltover*, 504 U.S. at 611.

2. Petitioner *never* waived the issue of whether Respondents' activities satisfied the jurisdictional nexus requirement in the "direct effect" clause, nor could he. As Respondents acknowledge, the Eleventh Circuit's decision hinged on whether "Peru's activities fell within any of the three clauses of FSIA's [sic] commercial activity exception, including the direct effect clause." Resp. at 11. Indeed, the Eleventh Circuit identified its task as "consider[ing] the evidence that bears on § 1605(a)(2)'s three jurisdictional nexuses." Pet. App.[3] at 20a. The court thereafter evaluated the evidence Petitioner put forth in support of his argument that Respondents' conduct caused a "direct effect" in the United States. *See id.* at 25a-26a. The issue Petitioner presents to this Court therefore has

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[3] "Pet. App. at ___" refers to the Appendix submitted in support of the Petition for Writ of Certiorari. "Resp. App. at ___" refers to the Appendix Respondents submitted in support of their brief in opposition.

not been waived. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (noting that the principle of waiver "does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue").

3. The Eleventh Circuit's decision here clearly conflicts with the decisions of other circuits. In rejecting Petitioner's arguments below, the Eleventh Circuit held that Respondents' conduct did not create "*significant* financial consequences in the United States" as required by the court's pre-*Weltover* decision in *Harris Corp. v. Nat'l Iranian Radio and Television*, 691 F.2d 1344 (11th Cir. 1982). Pet. App. at 26a (emphasis added). In *Harris Corp.*, the Eleventh Circuit framed the "direct effect" issue by asking whether the foreign sovereign's conduct was "sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case." 691 F.2d at 1351 (quoting *Texas Trading and Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1981)). The court held that Section 1605(a)(2)'s "direct effect" clause was satisfied because the sovereign defendant's conduct resulted in "*significant*, *foreseeable* financial consequences here." *Id.* (emphasis added).

Beyond running counter to this Court's instruction in *Weltover* that a direct effect need not be "substantial" or "foreseeable," *see Weltover*, 504 U.S. at 618, the Eleventh Circuit's decision here and in *Harris Corp.* is on all fours with the Second and Ninth Circuits' judicially created "legally significant act" test. The "legally significant act" test, as formulated by the Second Circuit, "requires that the conduct having a direct effect in the United States be legally significant

conduct in order for the commercial activity exception to apply." *See Filatech S.A. v. France Telecom S.A.*, 157 F.3d 922, 931 (2d Cir. 1998).

The Eleventh Circuit here went much further, however, and likened the "direct effect" clause to the contacts necessary for a court to exercise personal jurisdiction over a non-resident defendant. *See* Pet. App. at 25a. To satisfy the due process requirements under a personal jurisdiction analysis, according to the Eleventh Circuit, a defendant's contacts with the forum state must meet three considerations:

> (1) purposeful availment of the forum state; (2) the cause of action arises out of the activities of which [a defendant] purposefully availed [itself], i.e., the contacts must proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum state; and (3) reasonable foreseeability that a defendant should reasonably anticipate being haled into court there.

Future Tech. Today, Inc. v. OSF Healthcare Sys., 218 F.3d 1247, 1250-51 (11th Cir. 2000) (internal citation and quotation omitted, emphasis in original).[4] The Eleventh Circuit thus goes above and beyond the Second Circuit's formulation of the "legally significant act" test to require that a foreign sovereign defendant must possess extensive contacts within the United States to satisfy the "direct effect" effect clause.

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[4] Notably, the Eleventh Circuit cited to *Future Tech.* in holding that Petitioner failed to present evidence sufficient to satisfy the "direct effect" clause. *See* Pet. App. at 25a.

Respondents stress that the reward offer, Emergency Decree 049-2001, did not mandate payment of the reward in the United States.[5] Resp. at 15a-16a. Respondents argue that as a result, there was no "direct effect" felt in the United States. *See id.* The Fifth Circuit rejected this same argument in *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998). There, the court interpreted *Weltover* to signify that a foreign sovereign defendant's failure to make a contractually obligated payment in the United States could result in a "direct effect" sufficient to invoke jurisdiction. *See Voest-Alpine*, 142 F.3d at 894. But the court went on to explain that "*Weltover*'s reliance on a legally significant act in the United States does not justify, much less compel, the conclusion that it is or should be some kind of threshold requirement under the third clause." *Id.* The *Voest-Alpine* court thus concluded that the test of whether the "direct effect" clause is satisfied turns not on "arcane doctrines" such as place of payment, but instead focuses on whether the foreign sovereign defendant's activities, as a whole, created effects which were felt in the United States. *Id.* at 895.

Petitioner meets the Fifth Circuit's test under the "direct effect" clause here, even under Respondents' skewed view of the facts. To be sure, it is undisputed that Petitioner was located in Miami at the time Respondents conveyed the reward offer to him; that Petitioner made the key telephone call to his cohorts

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[5] Respondents, of course, conveniently omit that Emergency Decree 049-2001 did not require payment to be made in Peru, either. In other words, the reward offer is *silent* as to the place of payment.

from Miami which resulted in Montesinos' arrest;[6] and that Respondents denied Petitioner's claim for the $5 million reward while Petitioner was in Miami.

Respondents also ignore Petitioner's argument, and the district court's conclusion, that the reward offer constituted a unilateral contract. *See* Pet. at 7. In other words, the contract at issue here was negotiated, consummated, and breached *in Miami*. Petitioner therefore satisfied the "direct effect" clause as interpreted by the circuits rejecting the "legally significant act" test: Petitioner suffered a non-trivial financial loss as an immediate consequence of Respondents' conduct. *See, e.g., DRFP L.L.C. v. Republica Bolivariana de Venezuela*, Nos. 09-3424, 09-3725, 2010 WL 3781287, *4 (6th Cir. Sept. 23, 2010) (contract's silence as to place of payment held not dispositive in "direct effect" analysis); *Voest-Alpine*, 142 F.3d at 896 ("direct effect" clause satisfied where U.S.-based plaintiff suffered a non-trivial financial loss as a result of the foreign sovereign defendant's conduct).

4. The public policy considerations at issue here favor this Court granting the Petition. Respondents' attempt to dismiss the undeniable policy concerns at

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[6] Respondents' attempt to characterize these significant acts as mere law enforcement activity which cannot serve as a basis for satisfying the FSIA's commercial activity exception is unavailing. Resp. at 14 (citing *Saudia Arabia v. Nelson*, 507 U.S. 349, 362 (1993)). As the Eleventh Circuit noted in *Guevara I*, "the oldest American decision recognizing a commercial activities exception to sovereign immunity involved a reward for capture." Pet. App. at 67a (citing *The Bellona*, 8 F. Cas. 559 (D.C.S.C. 1798) (No. 4,407).

play by arguing that the United States urged the Eleventh Circuit to dismiss this case on international comity and act of state grounds. Resp. at 19-21. First, the Eleventh Circuit in *Guevara I* took pains to emphasize how requiring Respondents to honor their bargain is critical to not only Peru's national security interests, "but those of every country that offers rewards for information, including this country." Pet. App. at 72a-73a. Those same concerns remain of equal, if not greater, force today.

Second, Respondents do little to demonstrate that the "gap" Petitioner exposed between the opposing views taken by the State Department and the FBI with respect to Petitioner's claim for the reward is "illusory." Resp. at 20. There is a marked difference between the FBI *objecting* to Special Agent Currier testifying at trial, and the FBI *disavowing* Agent Currier's statements altogether. Here, the FBI merely objected to Agent Currier testifying because it believed that his testimony would disclose confidential investigatory techniques and procedures. Resp. App. at 16a. The FBI's objection in no way, however, "disavowed" Special Agent Currier's prior requests on two separate occasions for Respondents to honor their obligation. Pet. App. at 80a-83a. The "gap" Petitioner highlighted is therefore anything but "illusory" as Respondents maintain.

Third, Respondents cannot be heard to complain that the district court failed to dismiss Petitioner's case on international comity and act of state grounds, because Respondents never raised an abstention-based defense before the district court; a fact not lost upon the United States. *See* Resp. App. at 50a. If anything, Respondents *invited* the district court to evaluate

whether the Special High Level Committee's decision to deny Petitioner's claim was reasonable. *See* DE-166, p. 7.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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